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82-271

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the rule established by this Court in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), that the filing of a purported class action in federal court suspends the running of the statute of limitations for unnamed class members until a decision is reached whether to certify the class, and that following a denial of certification the statute resumes running again, is applicable to a purported class action brought in federal court seeking relief under 42 U.S.C. § 1983.

2. Whether this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), precludes application of the rule of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), to purported class actions brought in federal court seeking relief under 42 U.S.C. § 1983.

3. Whether under this Court's holding in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), for purposes of determining when the statute of limitations begins to run, a cause of action under 42 U.S.C. § 1983 alleging a discriminatory decision not to reappoint an employee to a non-permanent position accrues at the time the employee is orally notified of such non-reappointment, where the employee has declared in a sworn statement filed with the district court that through such oral notice he was informed of the non-reappointment decision and that subsequent written notice served only to confirm such oral notice.

## PARTIES TO THE PROCEEDING

The Petitioners are Carlos Chardon, individually, Maria Socorro Lacot, as the current Secretary of Public Education for the Commonwealth of Puerto Rico*, and Oscar Ramos, individually and as the Assistant Secretary of Personnel for the Department of Education of the Commonwealth of Puerto Rico.

Petitioners request a writ of certiorari to the Court of Appeals for the First Circuit to review the judgment entered in favor of the following thirty-seven respondents, whose cases were considered in one appeal below, Nos. 81-1567 and 81-1607:

1. Aurora Sierra Pizarro
2. Virginia Otero Arroyo
3. Juan Fumero Soto
4. Dora Castro de Aguilar
5. Reinaldo Rodriguez Solivan
6. Elba Rosario de Bravo
7. Ramon Norat Zayes
8. Charles H. Quiles Mariani
9. Bienvenido Rivera Diaz
10. Carmen M. Morales Hernandez
11. Juan Rivera Pagan
12. Joaquin Cruz Mendez
13. Ursula Aguilar Quintero
14. Aminta Rivera Cardona
15. Roberto Cruz Cruz
16. Nelson Velez Quinones
17. Cristina Cancel Cuevas
18. Maria D. Guerra Navarro

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* By automatic substitution when Mr. Chardon, who was sued individually and as Secretary of Education, resigned his position.

19. Francisco Bonilla Ocasio
20. Heriberto Gallardo Gutierrez
21. Julio E. Colon
22. Aida Rodriguez Rios
23. Jose Ortiz Rivera
24. Carmen Nunez Rivera
25. Carmen L. Negron Marin
26. Carmen Garcia Rosado
27. Noelia Torres de Cantres
28. Antonio Rodriguez Rivera
29. Jose E. Aponte de la Torre
30. Carmen H. Montez Velez
31. Nilsa Cardona Flores
32. Elba M. Colon Torres
33. Ana Mercedes Ortiz Colon
34. Sylvia M. Denis
35. Bienvenido Castro del Valle
36. Santiago Gonzalez Velasquez
37. Angela Colon Santiago

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CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit entered in favor of the thirty-seven respondents herein on June 8, 1982, as modified on rehearing on July 6, 1982.

### OPINIONS BELOW

The opinion of the court below dated June 8, 1982, has not been reported, but is reproduced in the Appendix hereto, 7a-37a. The order issued by the court below on July 6, 1982, modifying its opinion of June 8, 1982, is reproduced in the Appendix, 3a-4a. The orders of the court below entered on July 6, 1982, and July 28, 1982, denying petitioners' petitions for rehearing, are reproduced in the Appendix, 5a-6a and 1a-2a. The May 7, 1981 Memorandum Opinion of the United States District Court for the District of Puerto Rico, which was reviewed on appeal by the court below, is reported at 514 F. Supp. 339 (D.P.R. 1981) and reproduced in the Appendix,

51a.-73a. The District Court's unreported Order of May 7, 1981, which accompanied the foregoing Memorandum Opinion, is reproduced in the Appendix, 48a-50a. Also reproduced are the District Court's Order, Appendix 43a-47a, and Final Order and Judgment, Appendix, 38a-42a, both dated July 24, 1981.

## JURISDICTION

The judgment of the court below was entered on June 8, 1982. Petitioners timely filed a Petition for Rehearing, which the court below denied on July 6, 1982. Appendix, 5a-6a. Eight of the respondents timely filed a Petition for Rehearing and Modification of Judgment, which the court below granted on July 6, 1982, and modified its opinion accordingly. Appendix, 3a-4a. Petitioners thereafter timely filed a Petition for Rehearing on Modification of Judgment, which the court below denied on July 28, 1982. Appendix, 1a-2a. This petition for writ of certiorari was filed on August 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

### 42 U.S.C. § 1983 (Supp. IV 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

These thirty-seven consolidated cases are related to the cases decided by this Court last term in *Chardon* v. *Fernandez*, 454 U.S. 6, 102, S.Ct. 28 (1981), and arose out of essentially the same facts. Appendix, 9a.[1]

As in *Fernandez*, the petitioners here are Carlos Chardon, individually, Maria Socorro Lacot, as the current Secretary of Public Education (by automatic substitution when Mr. Chardon resigned that position), and Oscar Ramos, individually and as the Assistant Secretary for Personnel of the Department of Education.

Like the respondents in *Fernandez*, the respondents here held non-tenured administrative positions in the Puerto Rico Department of Education for the 1976-77 school year. Appendix, 9a. These respondents were notified—one on May 27, 1977,[2] and the others on or after June 17, 1977—that their appointments would not be renewed for the 1977-78 school year and that, instead, they would be reinstated to the tenured teaching posi-

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[1] In *Fernandez*, this Court reversed the judgments previously entered by the Court of Appeals for the First Circuit and remanded the cases for further proceedings. 454 U.S. at ____, 102 S.Ct. at 29. On remand, the Court of Appeals decided the *Fernandez* cases and the instant *Fumero Soto* cases in the same opinion. Appendix, 8a-9a.

[2] Respondent Ortiz Rivera was orally notified on that date that his appointment would not be renewed. Appendix, 81a-82a. In sworn testimony in the District Court, Ortiz Rivera said that written notification, which he received thereafter, confirmed what he had already been told on May 27. Appendix, 81a-83a. Petitioners contended in the court below that, under this Court's ruling in *Fernandez*, *supra*, Ortiz Rivera's cause of action accrued on May 27, 1977, but the Court of Appeals rejected this contention. Appendix, 5a-6a. See argument, *infra*, at 13-16.

tions they had held previously in the Department. Appendix, 10a.

On June 19, 1978, Jose Ortiz Rivera, one of the respondents herein, filed a purported class action against Chardon and Ramos in the United States District Court for the District of Puerto Rico. Appendix, 10a. Ortiz Rivera claimed that the Department of Education had failed to reappoint him, and the members of the class he purported to represent, because of their political affiliation. Ortiz Rivera sought relief under 42 U.S.C. § 1983. Appendix, 10a. Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201 and 2202.

On August 21, 1978, the District Court denied class certification on the ground that the class was not so numerous as to make joinder impracticable. Appendix, 11a. More than four months later, on dates ranging from January 10 to January 31, 1979, ninety individual plaintiffs, including the remaining thirty-six respondents herein, filed separate complaints, each making essentially the same claims, thus bringing to ninety-one the total number of related cases then pending in the District Court. Chardon and Ramos filed separate answers in each case, and in each such answer stated as an affirmative defense that the action was barred by the applicable statute of limitations. Appendix, 13a.

In Puerto Rico, the limitations period applicable to a claim under 42 U.S.C. § 1983 is one year. 31 L.P.R.A. § 5298(2). Appendix, 13a. The District Court thus dismissed thirty-six cases as time-barred. Appendix, 12a. In each of those cases the plaintiff had received notice of the non-reappointment decision more than one year before

Ortiz Rivera filed his purported class suit.[3] These thirty-six cases, then, became the *Fernandez* cases, in which the Court of Appeals for the First Circuit held that the limitations period began to run not when notice of non-reappointment was received, but when the plaintiffs' appointments ended. *Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981). This Court reversed, holding that the plaintiffs' causes of action under 42 U.S.C. § 1983 accrued on the dates that they were "notified . . . that a final decision had been made to terminate their [temporary] appointments." *Chardon* v. *Fernandez*, 454 U.S. at ____, 102 S.Ct. at 29. As noted above, this Court remanded the thirty-six *Fernandez* cases for further proceedings.

After the *Fernandez* cases had been dismissed by the District Court, and while those cases were on appeal, the remaining fifty-five individual cases—the *Fumero Soto* cases—were consolidated for trial. Appendix, 12a. The District Court bifurcated the trial into liability and damage phases, and reserved its decision on the statute of limitations defense in all fifty-five cases. Appendix, 12a. After trial in January 1981, the jury returned a verdict in favor of all fifty-five plaintiffs on the question of liability. Appendix, 12a. Thereafter, in light of the jury's answers to certain special interrogatories, the District Court found Chardon and Ramos immune from liability individually, but ordered the Department of Education to reinstate all the plaintiffs to their previous administrative positions with full back pay. Appendix, 12a-13a. Judg-

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[3] Thus, the filing of the purported class action could have had no tolling effect on the running of the statute of limitations for those thirty-six plaintiffs.

ments were entered accordingly.[4] Appendix, 38a-42a. Petitioners herein appealed on the ground that, *inter alia*, all the suits were filed after the statute of limitations had expired and thus were time-barred.[5] Respondents cross-appealed contending that the defendants below did not enjoy individual immunity.

The court below issued its opinion on June 8, 1982, disposing of the cross-appeals in the fifty-five *Fumero Soto* cases, as well as the thirty-six *Fernandez* cases then before the court on remand.[6] With respect to the *Fernandez* cases, the court vacated the judgments it had previously entered and remanded those cases to the District Court with instructions to dismiss. Appendix, 37a. With respect to the *Fumero Soto* cases, the court reversed the judgment entered by the District Court in twenty-six of the fifty-five cases and remanded those cases with instructions to dismiss. In those twenty-six

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[4] The District Court, in entering judgment, necessarily rejected the statute of limitations defense on which it had reserved decision prior to trial.

[5] Petitioners also appealed on the grounds that the District Court erred in refusing to enter judgment for them notwithstanding the verdict, and that the back pay award entered against the Department of Education violated the Eleventh Amendment to the United States Constitution. The court below did not find error in the District Court's refusal to grant judgment notwithstanding the verdict, but reversed the back pay award, finding it in violation of the Eleventh Amendment. Appendix, 30a, 36a.

[6] After this Court issued its decision in *Fernandez*, the court below directed the parties to submit briefs on the question whether the statute of limitations had been tolled in any of those thirty-six cases and whether that issue should be certified to the Supreme Court of Puerto Rico. The court concluded that no tolling had occurred, and that the issue did not need to be certified. Appendix, 30a, 34a.

cases, the plaintiffs were in precisely the same position as the thirty-six plaintiffs in *Fernandez* and were therefore found to be time-barred. Appendix, 27a.

As to the remaining twenty-nine *Fumero Soto* plaintiffs, who had received notice after June 19, 1977, the court found their suits to have been timely filed. Appendix, 27a.[7] To reach that result the court held that the filing of the class suit by Ortiz Rivera tolled the running of the statute of limitations as to unnamed class members, but that, after class certification was denied, each unnamed class member then had another full year within which to bring suit. Appendix, 18a.

Chardon and Ramos timely petitioned the court below for rehearing on the grounds that the court erred in holding that the denial of class certification caused the one-year limitations period to begin running anew, and that Ortiz Rivera's own suit was untimely since he had received notice more than one year before his complaint was filed. The court denied the petition on July 6, 1982. Appendix, 5a-6a.

Eight of the *Fumero Soto* plaintiffs whose judgments had been reversed also petitioned for rehearing on the ground that their complaints were not time-barred, even though they had received notice on June 17, 1977. They argued that since June 17, 1978—the date on which the one-year limitations period expired in their cases—fell on a Saturday, they were entitled under Puerto Rico law to benefit from the filing of the class suit on Monday, June

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[7] Their cases were remanded to the District Court for assessment of compensatory damages against the individual defendants, Chardon and Ramos. Appendix, 37a.

19, 1978. Without offering defendants an opportunity to respond, the court below granted plaintiffs' petition and modified its judgment accordingly, thus bringing to thirty-seven the number of plaintiffs held to have timely filed their complaints. Appendix, 3a-4a. Chardon and Ramos petitioned for rehearing on the modification of judgment pointing out that, contrary to respondents' contentions, Saturdays are not excluded under Puerto Rico law from computation of a statute of limitations period.[8] Petitioners simultaneously moved the court for a stay of mandate pending application to this Court for a writ of certiorari. The court on July 28, 1982, denied the petition,[9] but granted the stay of mandate on the condition that application for the writ be filed by August 16, 1982. Appendix, 1a-2a.

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[8] The plaintiffs had advanced as authority for their position, 1 L.P.R.A. § 72, which provides:

> "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

Plaintiffs, however, failed to mention, or even acknowledge, 1 L.P.R.A. § 71, which defines "[h]olidays, within the meaning of sections 71-73" of Title 1. Saturdays are not included in that definition.

[9] In denying this petition, the court below held that the federal rules controlled, noting that F.R.Civ.P. 6 expressly excludes Saturday from such computations, and that F.R.App.P. 26 contains the same exclusion. Appendix, 1a-2a.

## REASONS FOR GRANTING THE WRIT

### I. In Holding That The Individual Complaints Of Unnamed Class Members Were Timely Filed, The Court Below Failed To Follow Two Controlling Decisions Of This Court.

In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), this Court held that the filing of a federal class action tolls the running of the statute of limitations for all purported class members until a decision is made whether to certify the class. If certification is denied, the statute resumes running and the individual class members then have whatever time remained in the limitations period when the class suit was filed within which to move for permission to intervene. 414 U.S. at 560-61.

In *American Pipe*, this Court noted specifically that it was addressing "an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts." 414 U.S. at 540. The rule adopted by this Court was described as "the rule most consistent with federal class action procedure." 414 U.S. at 554. Numerous courts have applied the rule of *American Pipe* as a rule of general applicability to class actions brought in federal court, including actions brought under 42 U.S.C. § 1983.[10]

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[10] For instance, *American Pipe* has been applied, or its principles have been distinguished on the facts, in Title VII cases, *e.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 391-92 (1977); *Parker* v. *Crown, Cork & Seal Co., Inc.*, 677 F.2d 391 (4th Cir. 1982); *Jefferson* v. *H. K. Porter Co.*, 485 F. Supp. 356, 360-61 (N.D.Ala. 1980), *aff'd*, 648 F.2d 337 (5th Cir. 1981); *Green* v. *United States Steel Corp.*, 481 F. Supp. 295 (E.D.Pa. 1979); in an I.C.C. rate refund enforcement action, *Appleton Electric Co.* v. *Graves Truck Line, Inc.*, 635 F.2d 603, 609-10 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981); in an action under the Truth-In-Lending Act, *Bantolina* v. *Aloha Motors*,

The court below clearly recognized that if the rule of *American Pipe* were applied in the instant cases, all of the unnamed class members would be time-barred:

> "Under *American Pipe*, the one-year statute of limitations would have been tolled on June 19, 1978, when Ortiz Rivera filed his class action. The tolling would have ended, and the remaining portion of the limitations period would have recommenced running on August 21, 1978, when the district court declined to certify the class. Over half of the plaintiffs in [the *Fumero Soto* and *Fernandez* cases combined] had received notice of demotion more than one year before Ortiz Rivera filed suit, so their claims would already have been time-barred. *The remaining plaintiffs would have had from one to one hundred and thirty-eight days to file individual complaints after August 21, 1978. The earliest individual com-*

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*Inc.*, 75 F.R.D. 26, 32-33 (D.Hawaii 1977); in an action seeking benefits under the Social Security Act, *Wright* v. *Califano*, 603 F.2d 666, 669 n. 8 (7th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); in a wrongful death action brought under the Suits In Admiralty Act, *Stoddard* v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314, 329 (C.D.Cal. 1980); in an action under state and federal banking statutes, *Haas* v. *Pittsburgh National Bank*, 526 F.2d 1083, 1096-98 (3d Cir. 1975); in actions involving alleged violations of the securities laws, *Stull* v. *Bayard*, 561 F.2d 429 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Arneil* v. *Ramsay*, 550 F.2d 774 (2d Cir. 1977); *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 461 F. Supp. 999, 1011-12 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954, (1981); and, finally, in actions brought under 42 U.S.C. § 1983, *Paxman* v. *Campbell*, 612 F.2d 848, 855 (4th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1129 (1981); *McCarthy* v. *Kleindienst*, 562 F.2d 1269, 1272-75 (D.C. Cir. 1977); *Morton* v. *Charles County Board of Education*, 373 F. Supp. 394 (D.Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975). *See also*, *Pavlak* v. *Church*, 51 U.S.L.W. 2068 (9th Cir. July 14, 1982).

> *plaints were not filed, however, until January 10, 1979, after expiration of the remaining one hundred and thirty-eight day period.*" Appendix, 14a; emphasis added.

Although the court correctly stated the rule of *American Pipe*, and clearly understood what it would mean to apply that rule in these cases, it nevertheless erroneously created an exception to that rule for class actions brought under 42 U.S.C. § 1983. Appendix, 17a. In that respect the court below failed to follow *American Pipe*.

In refusing to apply the rule of *American Pipe*, the court below cited *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), as requiring that "Puerto Rican tolling rules, rather than the federal rule of *American Pipe* . . . apply, unless they are inconsistent with federal law."[11] Appendix, 15a. Contrary to the suggestion of the court below, this Court's decisions in *Tomanio* and *American Pipe* are not in conflict. Indeed, in *Tomanio*, this Court, in considering the relationship between state and federal law in actions brought under § 1983, stated:

> "In § 1988, Congress 'quite clearly instructs [federal courts] to refer to state statutes' *when federal law provides no rule of decision for actions brought under § 1983.*" 446 U.S. at 484-85, *citing Robertson* v. *Wegmann*, 436 U.S. 584 (1978); emphasis added; citation and footnote omitted.

*American Pipe* clearly provides the applicable "rule of decision" for class actions brought in the federal courts.

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[11] This finding stands in marked contrast to the court's holding that the Federal Rules control on the question of how the limitations period is to be computed. Appendix, 1a.

Thus, in refusing to apply that rule in these cases, the court below failed to follow *Tomanio.*[12]

In any event, even when the court below looked to Puerto Rico law, as it felt constrained to do, it found "no discernible state rule" applicable to federal class actions brought under 42 U.S.C. § 1983. Appendix, 17a. Yet, apparently compelled to find some basis on which to hold the suits timely filed, the court below created a "state rule" with that effect. It did so by borrowing from *American Pipe* only the tolling or suspension principle of that holding. It rejected the balance of the rule of *American Pipe* and, instead, added a novel and unprecedented interpretation of Puerto Rico law, so as to extend the statute of limitations beyond the dates on which the respondents' individual complaints were filed. Thus, the court below declared that the filing of the class suit by Ortiz Rivera on June 19, 1978, stopped the statute of limitations from running against the other respondents herein[13] and that, when class certification was denied on August 21, 1978, each such respondent thereupon acquired a whole new year within which to file a separate lawsuit. Appendix, 18a. Given that whole new year, the

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[12] The effect of the Court of Appeals' holding is to remove from the application of *American Pipe only* federal class actions brought under 42 U.S.C. § 1983. Such an exception is unjustified and unwise; has never been sanctioned by this Court; and directly conflicts with this Court's holding in *American Pipe.* In any event, to the extent that this Court perceives a need to reconcile its holdings in *American Pipe* and *Tomanio,* this case presents an appropriate vehicle for that purpose.

[13] Whether Ortiz Rivera's suit was itself timely filed is addressed *infra,* at 13-16.

complaints filed by respondents in January 1979 were found to be timely.[14]

These failures of the court below to follow *American Pipe* and *Tomanio* warrant full review and reversal by this Court.

### II. In Holding That Ortiz Rivera's Complaint Was Timely Filed, The Court Below Failed To Follow A Controlling Decision Of This Court.

In *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), this Court held that respondents' causes of action under 42 U.S.C. § 1983 accrued when notice was received that a final decision had been made to terminate their appointments. 454 U.S. at ____, 102 S.Ct. at 29. In reaching that decision, the Court applied its decision in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), which it found to be "indistinguishable" from the *Fernandez* case.

The court below well understood the application of *Ricks* and *Fernandez* to the instant cases, stating:

> "[T]he crux of a § 1983 action is a discriminatory act, and in an employment case, this act occurs—and the

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[14] This Court has cautioned the lower federal courts against unwarranted adoption of whichever law, state or federal, would preserve the rights of plaintiffs in actions brought under 42 U.S.C. § 1983. Thus, in *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), in an admittedly different context, this Court stated:

> "If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." 436 U.S. at 593.

The court below has disregarded this admonition in its search for a rule favoring respondents.

> limitations period begins to run—when notice of termination or demotion is given . . ." Appendix, 22a.
>
> * * *
>
> "The date of notice of termination is the triggering date under *Ricks* and *Rivera Fernandez* . . ." Appendix, 26a.

The court, however, refused to apply the foregoing principle in determining whether Ortiz Rivera's suit itself was timely filed.

In a sworn statement filed with the District Court, Ortiz Rivera stated that he was notified on May 27, 1977, over a year before he filed his suit on June 19, 1978, that a final decision had been made not to renew his temporary appointment for the 1977-78 school year. Appendix, 81a-83a. According to the statement, he visited the School Superintendent for his District on May 27, 1977, to advise her "in writing" that he "wished to return" to his tenured position as classroom teacher for the 1977-78 school year, and thus did not wish to have his temporary appointment renewed. Appendix, 81a-82a. During that visit, however, he was advised that his written request was not necessary "since it had already been determined" that his temporary appointment as school director would not be renewed, and that he "was going to be assigned to [his] permanent position of school teacher." Appendix, 82a.

Prior to this Court's decisions in *Ricks* and *Fernandez*, the District Court, in ruling on a motion to dismiss Ortiz Rivera's suit as time-barred, held that it was "unclear from the record" whether, when Ortiz Rivera received notice on May 27, 1977, that he "knew or should have known, of the [alleged] illegal motivations behind the decision to return him to his previous position." Appen-

dix, 79a. The court held that a cause of action of "[t]he present type" does not accrue until the date plaintiff "is *officially informed* that he is being demoted and he is aware of the reasons for this demotion." Appendix, 79a; emphasis added. In Ortiz Rivera's case, the District Court ruled that he was "officially informed" on June 21, 1977.[15] The court below upheld that ruling.

That ruling constitutes a substantial departure from this Court's decisions in *Ricks* and *Fernandez*. In *Ricks*, the Court stated that "the only alleged discrimination occurred—and the filing limitations therefore commenced—at the time the tenure decision was made and communicated to Ricks." 449 U.S. at 258. Similarly, in *Fernandez*, this Court looked to the date respondents were "notified . . . that a final decision had been made to terminate their appointments."[16] 454 U.S. at ____, 102 S.Ct. at 29. Under the decisions in *Ricks* and *Fernandez*, there is no basis for the court below to have rejected the notice Ortiz Rivera received from the School Superintendent on May 27, 1977—particularly since the notice received on that date, according to Ortiz Rivera's own

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[15] Relying on a June 21, 1977 "date stamp" placed on the June 10 letter, the court held that Ortiz Rivera's cause of action accrued on June 21 and that his suit was therefore timely. Nowhere in the record is there any evidence that Ortiz Rivera in fact received the letter on June 21. Indeed, it is significant that his sworn statement omits any such claim; to the contrary, it states explicitly "*I was demoted or removed from the position . . . on June 10, 1977* . . . as per letter dated on said date . . ." Appendix, 81a; emphasis added. Thus the only two dates of notice for which there is any support in the record (May 27 and June 10, 1977) establish conclusively that Ortiz Rivera's suit was not timely filed.

[16] Indeed, the court below recognized that "[t]he date of notice of termination is the triggering date . . ." Appendix, 26a.

sworn statement, constituted, in his mind, notice of the non-reappointment decision.[17]

In the instant case, the Department's decision was communicated to Ortiz Rivera on May 27, 1977 and his cause of action accrued on that date. Thus his suit, brought more than one year thereafter, was untimely.[18] In holding to the contrary, the court below failed to follow this Court's decision in *Fernandez*.[19] Full review and reversal by this Court is warranted accordingly.

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[17] This Court need not reach the hypothetical question whether oral notice is sufficient in all cases to mark the accrual of a cause of action under Section 1983. Here Ortiz Rivera received his notice from his superior, the School Superintendent, and expressly declared in his sworn statement to the District Court that it was through that communication that he was notified of the non-reappointment decision. Appendix, 81a-83a.

[18] Of course, since the class suit was not timely filed, it could not have had the tolling effect attributed to it by the court below. Indeed, since Ortiz Rivera's cause of action was time-barred, he was not a member of the class he sought to represent and thus could not have acted as a class representative. *Cf. Weinberger* v. *Retail Credit Co.*,498 F.2d 552, 556 (4th Cir. 1974), *explained in, In re Independent Gasoline Antitrust Litigation*, 79 F.R.D. 552, 558 n.4 (D.Md. 1978); *see also Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975); *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962).

[19] Furthermore, the ruling of the court below on this point is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *McWilliams* v. *Escambia County School Board*, 658 F.2d 326, 328-30 (5th Cir. 1981). In that case, the court held that a cause of action under Section 1983 for employment discrimination accrued when it became "apparent" through an oral communication that the plaintiff/teacher's temporary appointment would not be renewed for the following school year. Noting that its decision was consistent with *Ricks*, the court stated:

> "If the complainant knows or reasonably should know that the challenged act has occurred, the employer necessarily has made its decision and communicated it to the complainant." 658 F.2d at 328 n. 1.

## CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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**Nos. 81-1567**
**81-1607**

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JUAN FUMERO SOTO, ET AL.,
*Plaintiffs-Appellees-Cross-Appellants,*

v.

CARLOS CHARDON, ETC., ET AL.,
*Defendants-Appellants-Cross-Appellees.*

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**Before COFFIN, *Chief Judge*,**
**GIBSON,* *Senior Circuit Judge*,**
**and BOWNES, *Circuit Judge*.**

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**ORDER OF COURT**

Entered July 28, 1982

The motion of Chardon and Ramos, defendants-appellants, for stay of mandate pending application to the Supreme Court for a writ of certiorari is granted upon the condition that said application is filed by August 16, 1982, and the Clerk of this Court is given notice thereof.

The petition for rehearing on modification of judgment is denied. The date of filing is controlled by the Federal Rules and Federal Rule of Civil Procedure 6 expressly excludes from computation "a Saturday, a Sunday or a legal holiday" and

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* Of the Eighth Circuit, sitting by designation.

Federal Rule of Appellate Procedure 26 contains the same exclusion.

By the Court:

/s/ Dana H. Gallup
DANA H. GALLUP
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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**Nos. 81-1567**
**81-1607**

---

JUAN FUMERO SOTO, ET AL.,
*Plaintiffs-Appellees-Cross-Appellants,*

v.

CARLOS CHARDON, ETC., ET AL.,
*Defendants-Appellants-Cross-Appellees.*

---

**By COFFIN, *Chief Judge,***
**GIBSON,* *Senior Circuit Judge,***
**and BOWNES, *Circuit Judge.***

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**ORDER OF COURT**

Entered July 6, 1982

The petition for modification of judgment by plaintiffs-appellees and cross-appellants is granted. Those plaintiffs who received their letters of demotion on June 17, 1977, or thereafter are not time-barred. The last two lines on page 31 of the slip opinion and the first two lines on page 32 should be changed to read as follows:

> In Nos. 81-1567 and 81-1607, *Juan Fumero Soto, et al.* v. *Chardon, et al.*, the liability judgment in favor of those

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* Of the Eighth Circuit, sitting by designation.

plaintiffs who received letters of notice of demotion on June 17, 1977, or thereafter is affirmed, etc.

By the Court:

/s/ Dana H. Gallup,
DANA H. GALLUP,
Clerk.

By:/s/ Francis P. Scigliano
FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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**Nos. 81-1567**
**81-1607**

---

JUAN FUMERO SOTO, ET AL.,
*Plaintiffs-Appellees-Cross-Appellants,*

v.

CARLOS CHARDON, ETC., ET AL.,
*Defendants-Appellants Cross-Appellees.*

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**By COFFIN, *Chief Judge,***
**GIBSON,* *Senior Circuit Judge,***
**BOWNES, *Circuit Judge.***

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**ORDER OF COURT**

Entered July 6, 1982

The petition for rehearing by defendants-appellants and cross-appellees is denied for the following reasons. The district court found in ruling on defendants' motion for summary judgment as to Ortiz Rivera:

> The present type of cause of action accrues on the date Plaintiff is officially informed that he is being demoted and he is aware of the reasons for this demotion. It is at this point that there is present a "complete and present cause of action." *Rawlings* v. *Ray*, 314 U.S. 96, 98 (1948). In the present case this occurred on June 21, 1977. Therefore, a complaint filed on June 19, 1978 would be timely.

Joint Appendix at 73.

In arriving at this conclusion, the court considered plaintiff's sworn statement to the effect that he was orally informed on

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* Of the Eighth Circuit, sitting by designation.

May 27, 1977, that he was going to be removed from his position as school director and assigned to his permanent position of teacher. The court specifically found:

> First from the informal and unofficial information Plaintiff received in May, 1977 one could not conclude that Plaintiff lost all reasonable expectations that he would continue at his position. Second, and along the same lines from the informal conversation one cannot conclude that Plaintiff was in fact demoted or reassigned. Until he was informed officially Plaintiff had no reason to believe that he was demoted.

*Id.* at 72.

We do not think the district court erred in making this finding. In the case cited by defendants, *McWilliams* v. *Escambia County School Board*, 658 F.2d 326 (5th Cir. 1981), the district court found that the plaintiff reasonably knew prior to the critical date that his position was being changed. The court of appeals found that "the record contains ample evidence to support the district court's ruling." *Id.* at 328. This is the obverse of the fact situation in *McWilliams* but the same rationale applies.

We rule that, as with all the other plaintiffs, the statute of limitations started to run as to Ortiz Rivera on the day he received the official letter of demotion, which was on June 21, 1977. The class action was, therefore, timely filed.

The second argument in the petition, that *American Pipe* should control, was discussed thoroughly in defendants-appellants' brief and in our opinion. No new reasons have been advanced that persuade us we should change the opinion in this regard.

By the Court:

/s/ Dana H. Gallup,
DANA H. GALLUP,
Clerk.

By:/s/ Francis P. Scigliano
FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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**Nos. 80-1237, et al.**

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RAFAEL RIVERA FERNANDEZ, ET AL.,
*Plaintiffs-Appellants,*

v.

CARLOS CHARDON, ETC., ET AL.,
*Defendants-Appellees.*

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**On Remand From The Supreme Court**
**Of The United States**

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**Before**
**CAMPBELL, BOWNES, and BREYER,**
***Circuit Judges.***

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**Nos. 81-1567**
**81-1607**

---

JUAN FUMERO SOTO, ET AL.,
*Plaintiffs-Appellees-Cross-Appellants,*

v.

CARLOS CHARDON, ETC., ET AL.,
*Defendants-Appellants-Cross-Appellees.*

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**Appeals From The United States District Court**
**For The District Of Puerto Rico**
**[HON. ROBERT A. GRANT,* *U.S. District Judge*]**

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* Of the Northern District of Indiana, sitting by designation.

**Before**
**COFFIN, *Chief Judge*,**
**GIBSON,** ** ***Senior Circuit Judge*,**
**BOWNES, *Circuit Judge*.**

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***Sheldon H. Nahmod, Hiram R. Cancio, Harry R. Nadal-Arcelay, Jaime R. Nadal-Arcelay, Jesus R. Rabell-Mendez,*** and ***Cancio Nadal & Rivera*** on brief for appellants.

***K. Martin Worthy, John G. DeGooyer, Stephen L. Humphrey, Hamel, Park, McCabe & Saunders, Hector Reichard De Cardona,*** Secretary of Justice, and ***Ines Eguia De Casanova,*** Attorney, Department of Justice of Puerto Rico, on brief for appellees.

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June 8, 1982

BOWNES, *Circuit Judge*. Before us in the instant action are two groups of consolidated cases that represent fifty-five and thirty-six cases, respectively. All ninety-one cases are actions based on 42 U.S.C. § 1983 charging illegal acts of political discrimination. The first group of consolidated cases, *Fumero Soto* v. *Chardon*, is an appeal from a jury verdict that defendants are liable to plaintiffs in the fifty-five cases and from the relief ordered by the court in its equitable power. The second group of consolidated cases, *Rivera Fernandez* v. *Chardon*, is on remand from the Supreme Court, which, in *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341 (Nov. 2, 1981), reversed our decision on the statute of limitations issue in these cases,

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** Of the Eighth Circuit, sitting by designation.

*Rivera Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981).[1] The *Rivera Fernandez* cases had been dismissed by the district court and were not tried on the merits. We deal with these two sets of cases together because they both present questions concerning the tolling of the statute of limitations that are not foreclosed by the prior decisions in *Rivera Fernandez*. In addition, the defendants in *Fumero Soto* argue that the jury verdict was not supported by the evidence and that the damages award against the Puerto Rico Department of Education violated the eleventh amendment; plaintiffs in *Fumero Soto* contend that the individual defendants enjoy no immunity.

*The Facts and Case Histories*

All the *Fumero Soto* and *Rivera Fernandez* cases arose out of essentially the same facts. The plaintiffs in all cases held nontenured administrative positions in the Commonwealth of Puerto Rico Department of Education during the school year 1976-77. The defendants are Carlos Chardon, then Secretary of Education for the Commonwealth, Oscar Ramos, then and now Assistant Secretary for Personnel in the same department, and Maria Socorro Lacot, now the Secretary of Education, who was substituted for Chardon in his official capacity. Chardon and Ramos were originally sued in both their official and individual capacities. The events leading up to the instant actions began in January, 1977, when Carlos Romero Barcelo of the New Progressive Party (NPP) replaced Rafael Hernandez Colon of the Popular Democratic Party (PDP) as governor. Chardon and Ramos, members of the NPP, soon assumed positions in the Department of Education under the new regime. Chardon and Ramos, according to plaintiffs' complaints, then determined to remove nonpermanent administrative personnel who were active in the PDP or parties other than the NPP.

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[1] Our decision in *Rivera Fernandez* dealt with only twenty-three of the cases; we disposed of the other thirteen cases with separate but identical judgments. *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341, 3341 n.1 (Nov. 2, 1981).

All the plaintiffs received letters—most of them in May and June 1977—from Julio Cintron Lopez, Director of the Teaching Personnel Division, informing them that they would not be reappointed to the administrative positions they currently held for the school year 1977-78 and that they would instead be required to return to the lower-paying, tenured teaching positons that they had held before. Three of the *Rivera Fernandez* plaintiffs had not previously held tenured teaching posts, so they were discharged. Most, if not all, of the plaintiffs sent letters of protest to Chardon, objecting to their demotion or termination and informing him that they were referring the matter to the Teachers Association of Puerto Rico for appropriate legal action.[2]

On June 19, 1978, one demoted employee, Jose Ortiz Rivera, filed a class action against Chardon and Ramos in their individual and official capacities on behalf of all persons discharged or demoted by Chardon and Ramos for political reasons, claiming a violation of first and fourteenth amendment rights protected by 42 U.S.C. § 1983[3] and P.R. Laws Ann. tit. 18, §§ 214, 249a,

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[2] The letters were all virtually identical, the texts of which read in substance as follows:

> Dear Mr. Secretary:
>
> I have received a letter from the Department you direct dated [date], signed by Mr. Julio Cintron Lopez, Director of the Teaching Personnel Division. I am not in agreement with your decision.
>
> To that effect, I have sent a copy of the letter to the Teachers Association of Puerto Rico, so that said organization would instruct its Legal Division to take the corresponding action.
>
> In the meanwhile, I will obey the order issued by you.
>
> Sincerely,

[3] 42 U.S.C. § 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

249e.[4] Class certification was denied on August 21, 1978, because the class was not so numerous that joinder was impracticable. Fed.R.Civ.P. 23(a)(1). Plaintiffs then filed complaints

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[4] P.R. Laws Ann. tit. 18, § 214 provides as follows:

> Every public-school teacher in active service through an appointment made in accordance with the school law, the regulations of the Department of Education, and the regulations of the Commonwealth Board for Vocational and Technical Education, who shall have practiced as such in a school of any category during the probation period hereinafter specified, shall be entitled to be contracted as a permanent teacher in the category in which he may be practicing his profession at the expiration of the said probation period, without any further proof of classification or professional ability than the holding of a regular license of the same category of the position held by the teacher and to have, in the opinion of the Department, performed satisfactory work. For the purposes of sections 214-218 of this title, no consideration shall be given to the time such teachers may have been practicing as temporary teachers. Such teachers shall be entitled to be contracted as permanent teachers in the municipality where they may be teaching at the expiration of the probation period. The time worked by teachers with regular certificates as substitutes and who have performed satisfactory work in positions of the same category shall be confirmed as probationary period. The equivalence of the two (2) years of probationary period shall comprise the work performed with a substitute or probationary contract during two (2) consecutive years. Such teachers shall be entitled to be contracted as probationary or permanent teachers in the municipality where they may be teaching when entitled to a regular position.

P.R. Laws Ann. tit. 18, § 249a provides as follows:

> For the purposes of sections 249a-249e of this title, all public-school teachers of Puerto Rico shall be considered as officers or employees of the Commonwealth Government while they are in active service, irrespective of the form and manner in which they may render their services to the people of Puerto Rico. By public-school teachers shall be understood, for the purposes of sections 249a-249e of this title, all teaching personnel, which includes both the teachers in charge of the teaching and special services directly connected with the teaching work, and the officers or employees in technical tasks or in school supervision and administration; all the teaching personnel contracted by the Vocational Education Board of Puerto Rico and those teachers contracted as such by other departments or agencies of the Commonwealth of Puerto Rico.

individually in January, 1979, the earliest filings occurring on January 10. The individual complaints repeated the claims of Ortiz Rivera's class suit.

The history of the *Rivera Fernandez* cases is as follows. The district court dismissed the cases on the ground that they were barred by Puerto Rico's one-year statute of limitations. *E.g.*, *Aviles Navarro* v. *Chardon*, 506 F. Supp. 229 (D.P.R. 1980). We reversed, holding that the letter notifications did not trigger the statute, but that the actual demotions and discharges did and that suit was filed within one year of these events. *Rivera Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981). The Supreme Court reversed, finding that *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), controlled and that the letter notifications started the statute running. *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341 (Nov. 2, 1981).

Meanwhile, decision was reserved on the statute of limitations question in the remaining fifty-five cases *(Fumero Soto)*. These cases were consolidated for trial, and the trial was bifurcated into liability and damages phases. After a five-day trial of the liability issues, a six-person jury returned unanimous verdicts in favor of the plaintiffs. The jury was also asked to answer special interrogatories, whether Chardon or Ramos acted with malicious intent to deprive plaintiffs of their constitutional or other rights. The jury answered these questions in the negative. The district court then asserted its equitable power to declare a remedy and ordered the Department of Education to reinstate those plaintiffs still in its employ to the

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P.R. Laws Ann. tit. 18, § 249e provides as follows:

> The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignment, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status.

positions they had held before their demotions and to give them back pay reflecting the difference in salary between their former positions and the positions to which they were demoted. Plaintiffs who had left the Department were held not entitled to reinstatement and were to receive back pay only for the period from the time of demotion to the time they left. On the basis of the jury's findings of no malicious intent, the court refused to award damages against Chardon and Ramos in their individual capacities or to award punitive damages. Defendants appealed; on August 14, 1981, we stayed that portion of the order requiring back pay because of "significant questions" as to its validity.

*The Issues*

The general issue is whether claims by any or all of the *Rivera Fernandez* and *Fumero Soto* plaintiffs were barred by the statute of limitations.[5] Before discussing the separate arguments raised, it is useful to mark a few recognized principles. In the absence of a federal statute of limitations, the analogous state statute is applied to the federal cause of action. *E.g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *O'Sullivan* v. *Felix*, 233 U.S. 318, 322 (1914). In Puerto Rico, the limitations period applicable to a § 1983 claim alleging violation of first amendment rights is one year. P.R. Laws Ann. tit. 31, § 5298(2); *Graffals Gonzalez* v. *Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977) (per curiam). At least as a matter of *federal* law, the filing of a class action will toll the statute of limitations for named and unnamed members of the class, and the statute will resume running when class certification is denied. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 561 (1974).

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[5] We take it that statute of limitations defenses were preserved in all cases. Defendants state that they raised the affirmative defense in timely fashion, and there is no contrary evidence. Nor do we believe that the defense was subsequently waived in any case, although the record on which plaintiffs rely for this argument is lamentably unclear.

Under *American Pipe*, the one-year statute of limitations would have been tolled on June 19, 1978, when Ortiz Rivera filed his class action. The tolling would have ended, and the remaining portion of the limitations period would have recommenced running on August 21, 1978, when the district court declined to certify the class. Over half of the plaintiffs in both sets of cases had received notice of demotion more than one year before Ortiz Rivera filed suit, so their claims would already have been time-barred. The remaining plaintiffs would have had from one to one hundred and thirty-eight days to file individual complaints after August 21, 1978. The earliest individual complaints were not filed, however, until January 10, 1979, after expiration of the remaining one hundred and thirty-eight day period.

Plaintiffs mount three attacks on the statute of limitations: that *Ricks* should not be applied retroactively; that the letters of protest tolled the statute of limitations;[6] and that the denial of class action certification in Ortiz Rivera's suit did not merely reactivate the statute of limitations, the *American Pipe* rule, but instead caused it to run anew. It is important to determine at the outset the relationships between these three contentions. The critical dates must be kept in mind: May-June 1977, notification by letters; August 31, 1977, plaintiffs vacate their positions; June 19, 1978, class action filed; August 21, 1978, class action dismissed; and January 10, 1979, first individual complaint filed.

The first claim, nonretroactivity, is insufficient alone to save all but a few of the suits because it would merely move the accrual date from the dates demotion letters were received to the date plaintiffs had to leave their positions, August 31, 1977. The class suit was filed nine months, nineteen days after that, so that, under the *American Pipe* rule, when class certification was denied on August 21, 1978, only two months, eleven days

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[6] Plaintiffs also argue in the alternative that this issue should be certified to the Supreme Court of Puerto Rico.

would have remained for all plaintiffs to file complaints. The period thus would have expired on November 1, 1978, before which time no individual complaints had been filed.

The second position, that the letters of protest sent by plaintiffs were sufficient under Puerto Rican Law to toll the statute of limitations so that it commenced running anew, is also inadequate alone in all but a few cases. This would save the otherwise time-barred claims of those who received notice of demotion prior to June 19, 1977, but who did not write a protest letter until after that date. The filing of the class action would then have been timely as to them. After certification was denied on August 21, 1978, they would have had whatever time had not expired from the one-year period in which to sue individually. The unexpired time would be insufficient in most cases, however, to carry over into January.

The third contention, that denial of class certification on August 21, 1978, starts the one-year statute running from scratch, by itself would save claims that were based on notices of termination received within a year prior to filing of the class action, June 19, 1978. This rule alone would not help any of the *Rivera Fernandez* plaintiffs, all of whom received discharge notifications before June 19, 1977. In combination with the nonretroactivity contention, this would save all *Rivera Fernandez* and *Fumero Soto* claims because they would not accrue until August 31, 1977. In combination with the letter tolling contention, the third argument would save those additional claims in which notice was received before June 19, 1977, but a letter of protest was sent after that date.

*The Tolling Effect of the Class Action*

The linchpin of plaintiffs' contentions, therefore, is that, under Puerto Rican law, a class action will cause the statute of limitations to begin running anew. Puerto Rican tolling rules, rather than the federal rule of *American Pipe* in which the running of the limitations period is merely suspended, apply, unless they are inconsistent with federal law. *Board of Regents*

v. *Tomanio*, 446 U.S. 478, 483-86 (1980). Under P.R. Laws Ann. tit. 31, § 5303, the limitations period against an action ceases to run when the action is instituted in court; if the action is discontinued, the case law has held that the limitations period begins to run anew from that time. *E.g.*, *Feliciano* v. *Puerto Rico Aqueduct & Sewer Auth.*, 93 P.R.R. 638, 644 (1966); *Heirs of Gorbea* v. *Portilla*, 46 P.R.R. 279 (1934); *De Jesus* v. *De Jesus*, 37 P.R.R. 143 (1927). *See also Hernandez del Valle* v. *Santa Aponte*, 440 F. Supp. 254 (D.P.R. 1977), *rev'd on other grounds*, 575 F.2d 321 (1st Cir. 1978); *Bedard* v. *Consolidated Mutual Insurance Co.*, 313 F. Supp. 1021, 1021-22 (D.P.R. 1970). This tolling is effective only with regard to identical causes of action; the filing of one action does not toll the statute of limitations for all claims arising out of the same facts. *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315, 319-20 (1st Cir. 1978). The substantive claims asserted in Ortiz Rivera's class action complaint were identical to those alleged in the subsequent individual complaints. The question here is whether a class action is different from an individual complaint—at least as to unnamed plaintiffs in the class action—for purposes of the identical claim rule. The Puerto Rico Supreme Court has not ruled on this question. The obvious analogy is to the federal rule of *American Pipe*, wherein the running of the statute of limitations was suspended as to both named and unnamed class members. Defendants argue, however, that *American Pipe* cannot be used here because plaintiffs have resisted that part of the *American Pipe* rule that provides for suspension and have instead insisted that the statute of limitations run anew.

To the extent that defendants make an estoppel argument, we reject it, but the substance of their argument bears further consideration. Application of state tolling rules to § 1983 claims is required by 42 U.S.C. § 1988, *Board of Regents* v. *Tomanio*, 446 U.S. at 484-85; *Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978), unless the state rules are inconsistent with the federal policy underlying § 1983, *Board of Regents* v. *Tomanio*, 446 U.S. at 485-86; *see Johnson* v. *Railway Express Agency, Inc.*,

421 U.S. 454, 465 (1975) (same as to § 1981 claims). Thus in a § 1983 case, the federal rule and underlying reasoning of *American Pipe* are not generally applicable. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. at 466-67. *But see Morton* v. *Charles County Bd. of Educ.*, 373 F. Supp. 394, 396 (D. Md. 1974), *aff'd on other grounds*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975) (under *American Pipe*, § 1983 class action tolled limitations period for all class members). In the instant case, though, there is no discernible state rule. Moreover, Puerto Rico has modeled its class action procedure, P.R. Laws Ann. tit. 32, App. II, R. 20.1, on the federal class action procedure. *Caguas Lumber Yard, Inc.* v. *Superior Court*, 96 P.R.R. 826, 830 (1969). Because the decision in *American Pipe* that unnamed class members could take advantage of the tolling effect of a pending class action was based on an interpretation of the federal class action rule, Fed.R.Civ.P. 23(a), *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. at 550-52, we believe that this reasoning would also be applied in determining the relationship between class actions and tolling rules in Puerto Rico. We conclude that named and unnamed plaintiffs may benefit from the tolling effect of a class action, if class certification is later denied on grounds of lack of numerosity. *Cf. id.* at 552-53.

This conclusion answers only half of the question. The issue remains whether *American Pipe* or other reasons require that unnamed class members gain the benefit only of suspension of the running of the limitations period, notwithstanding the Puerto Rican rule that the statute starts to run anew under similar circumstances. In *American Pipe*, the pendency of the class action suspended the running of the limitations period because the statute providing the underlying cause of action, section 5(b) of the Clayton Act, provided for suspension where the government filed suit under the statute. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. at 560-61. In this case, neither § 1983 nor any of the related Civil Rights Acts provisions suggest the precise effect that commencement of a class action or any other action should have. It is true that "in the American

common law generally, prior judicial actions do not toll the statute of limitations, no matter how close their relationship to the one at bar." *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d at 319 (citations omitted). Puerto Rico has not adopted the American common law, however, and we see no reason not to apply its running-anew rule to unnamed plaintiffs. None of the parties has pressed on us an argument that the federal policies underlying § 1983 require a particular result here, *see Board of Regents* v. *Tomanio*, 446 U.S. at 485-86, and we can discern no particularly strong policies implicated. Two policies often associated with § 1983 and tolling rules are those of repose and federalism. *See Williams* v. *Walsh*, 558 F.2d 667, 674-75 (2d Cir. 1977). In this case, the class action—assuming that it itself was timely filed, a matter we discuss below—did not disturb any protected repose defendants enjoyed with respect to § 1983 claims, and commencement of a new limitations period after the pendency of the class action would not interrupt any further repose. In addition, defendants are Puerto Rican, and there is no unfair surprise in following Puerto Rican law. The policy of federalism also appears to be well served: Puerto Rican law is permitted its fullest effect without any visibly adverse impact on federal rights. We hold, therefore, that a class action asserting a § 1983 claim tolls the Puerto Rican statute of limitations during the pendency of the class action for all purported class members and that when class certification is denied for lack of numerosity, the limitations period begins to run anew.

*The Retroactivity of* Delaware State College *v.* Ricks

We now turn to the two remaining arguments on tolling, keeping in mind that the one-year statute of limitations was tolled by the filing of the class action on June 19, 1978, and started running anew when the class certification was denied on August 21, 1978. Success on the contention that the Supreme Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250, should not be applied retroactively would save all suits, so we now examine that. Defendants in *Fumero Soto* argue that the decision in *Chardon* v. *Rivera Fernandez*, 50

U.S.L.W. 3341, controls this issue and requires retroactivity because the facts in that group of cases involved the same alleged incidents of political discrimination as the *Fumero Soto* cases do. Nothing is said in the *Rivera Fernandez* opinion regarding retroactivity.[7] We do not think that the retroactivity question is therefore foreclosed.

The application of nonretroactivity depends on an evaluation of

> three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g.*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, [392 U.S. 481,] 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g.*, *Allen* v. *State Board of Elections*, [939 U.S. 544,] 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker*, [381 U.S. 618,] 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma*, [395 U.S. 701,] 706.

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[7] In further asserting the conclusive effect of *Rivera Fernandez*, defendants argue that the Supreme Court denied the *Rivera Fernandez* plaintiffs' petition for rehearing, which raised the nonretroactivity issue. Defendants' argument is utterly without merit because surely the denial of a petition for rehearing can have no greater precedential effect than the denial of a petition for certiorari, which is to say none. *See Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of certiorari).

*Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971). *See Aufiero* v. *Clarke*, 639 F.2d 49, 51 (1st Cir.), *cert. denied*, 452 U.S. 917 (1981). In analyzing *Chevron Oil's* first factor, plaintiffs direct us to several cases purportedly standing for the proposition that a § 1983 cause of action accrues when plaintiff is actually demoted or terminated. The weight of authority is far less than plaintiffs suggest. One of the cases cited stands essentially for the *Ricks* rule of accrual rather than for plaintiffs' asserted rule, *NLRB* v. *California School of Professional Psychology*, 583 F.2d 1099, 1101-02 (9th Cir. 1978) (applying § 10(b) of National Labor Relations Act); *accord*, *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873, 882 (2d Cir. 1977), three cited cases stand equally well for the *Ricks* rule as for plaintiffs' rule, *Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) (Age Discrimination in Employment Act); *Payne* v. *Crane Co.*, 560 F.2d 198, 199 (5th Cir. 1977) (per curiam) (same Act); *Fitzgerald* v. *Seamans*, 553 F.2d 220, 226-31 (D.C. Cir. 1977) (42 U.S.C. § 1985(3)), two are at best suggestive of plaintiffs' proposition, as we observed in *Rivera Fernandez* v. *Chardon*, 648 F.2d at 768, *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 192 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) (Age Discrimination in Employment Act); *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 95 (8th Cir. 1975) (same Act), and only one offers square support for plaintiffs' rule, *Egelston* v. *State Univ. College at Geneseo*, 535 F.2d 752, 755 (2d Cir. 1976) (Title VII). Moreover, despite the Second Circuit's decision in *Egelston*, the Fourth Circuit reached a contrary conclusion in December, 1977, *Bireline* v. *Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979). It is true that, as of the summer of 1977, little law existed regarding the accrual date of a § 1983 cause of action, but the one established principle was that a civil rights cause of action accrued when plaintiff knew or had reason to know of his or her injury, *see, e.g.*, *Cox* v. *Stanton*, 529 F.2d 47, 50 (4th Cir. 1975); 1 C. Antieau, Federal Civil Rights Acts § 241, at 412 (2d ed. 1980),

which could support either the *Ricks* rule or plaintiffs' rule.* We cannot say that *Ricks* established a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression. *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106.

The second factor bearing on nonretroactivity involves examining " 'the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " *Chevron Oil Co.* v. *Huson*, 404 U.S. at 107, quoting *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965). *Linkletter* restated the inquiry as one into the purpose of the new rule, reliance placed on the old rule, and the effect of retroactivity on the administration of justice, *Linkletter* v. *Walker*, 381 U.S. at 636. The inquiry has also been construed more simply as the last clause of the *Chevron Oil* factor: whether retroactive application will further or retard operation of the rule, *Wiltshire* v. *Standard Oil Co.*, 652 F.2d 837, 841 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3766 (Mar. 22, 1982). However stated, this test for the retroactivity of a rule of law requires an explanation of the purposes of the new rule and consideration of its impact on the prior law, which thereby make this test dependent on the first factor: the less (or the less clear) prior law, the less adverse impact there would be, and this would militate against retroactivity. The accrual rule of *Ricks* seems to promote more strongly the policy of repose that underlies the applicable state statute of limitations. The policy of repose is that a defendant can be expected to defend a suit

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* This observation relates to the question whether in a retroactivity analysis, we should focus on the state of the law at the time the claim arose, *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342, 347 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), or on the state of the law when the new decision comes out. We intimate no views on whether we agree with *Wachovia Bank*. That opinion would provide a stricter test for retroactivity here; we think that under *Wachovia* the "new" law was clear at the time plaintiffs' claims arose.

only for a certain period after the act complained of. The period of susceptibility to suit should begin when the defendant is first aware (or should be aware) of facts that give rise to the concrete possibility of suit. A competing policy is that a limitations period should not begin to run against a plaintiff until he is or should be aware of the actionable conduct. Under *Ricks* these policies are reconciled as follows: the crux of a § 1983 action is a discriminatory act, and in an employment case, this act occurs—and the limitations period begins to run—when notice of termination or demotion is given, not when the firing or demotion actually takes effect. Retroactive application of *Ricks* would give greater protection to defendants' repose without unduly limiting plaintiffs' ability to sue. Moreover, given the at best unsettled state of the law on accrual before *Ricks*, retroactive application would not disrupt expectations of either party. There would also seem to be little impact on the administration of justice whether or not *Ricks* is applied retroactively. The second test of *Chevron Oil* thus does not require nonretroactivity.

We might still find retroactivity barred if it would produce substantially inequitable results, the third *Chevron Oil* factor. This factor reflects concern that a plaintiff not be accused of "sleeping on his rights" when he could not have known of restrictions on his rights, *Chevron Oil Co.* v. *Huson*, 404 U.S. at 108, and that injustice or hardship not be caused, *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) (per curiam). The equities that the *Fumero Soto* plaintiffs rely on are their day in court to vindicate their right to freedom from political discrimination, the existing jury finding of liability on the part of the defendants, and the expenses already incurred at trial. Neither group of plaintiffs advance any reason, however, as to why they waited so long before filing suit, thereby risking a time bar if the date of notice of demotion were to become the accrual date. The then-existing law was not at all clear on this point. The right plaintiffs seek to enforce is not so important that limitations periods should be disregarded. The expenditure of time and energy in the *Fumero Soto* case is

regrettable, but the limitations problem had been recognized before the case was tried on its merits. We are unpersuaded that equity requires *Ricks* to be applied prospectively only, and we hold that *Ricks* applies retroactively.

*The Tolling Effect of the Letters of Protest*

We now turn to the argument that letters sent by the plaintiffs in both cases to Chardon and the Department of Education protesting their demotions constituted "extrajudicial claim[s] of the creditor[s]" within the meaning of P.R. Laws Ann. tit. 31, § 5303, which thereby tolled the limitations period and caused it to run anew. We have held that such extrajudicial claims must be "precise and specific" in order to have this desired tolling effect. *Gual Morales* v. *Hernandez Vega*, 604 F.2d 730, 733 (1st Cir. 1979), citing *Jimenez* v. *District Court*, 65 P.R.R. 35, 42 (1945). A proper extrajudicial claim must seek the same relief ultimately sought in the subsequent lawsuit. *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d 321, 323-24 (1st Cir. 1978). Plaintiffs believe that their protest letters satisfied these conditions. If they do not, however, they urge us to reconsider *Gual Morales* and *Hernandez del Valle* for the following three reasons: the Supreme Court's recent decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478, requires modification of our decisions; Puerto Rican law treats "extrajudicial claim" more liberally than do our decisions; and *Hernandez del Valle* erroneously used federal law in construing "extrajudicial claim" restrictively. Alternatively, they request that we certifiy to the Puerto Rico Supreme Court the question of the tolling effect of the protest letters.

The *Rivera Fernandez* and *Fumero Soto* plaintiffs sent virtually identical letters of protest to Chardon in which each plaintiff acknowledged receipt of his demotion letter, stated his disagreement with the decision, informed Chardon that he had sent a copy of the demotion letter to the Puerto Rico Teachers Association to take appropriate action, and said he would obey the order.[8] These letters did not make a "precise

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[8] See footnote 2 for the verbatim text of the letters.

and specific" claim for the relief ultimately sought. The plaintiffs later sought reinstatement, back pay, actual and punitive damages, costs and attorney's fees, and a permanent injunction against defendants from any further acts of political discrimination. None of these claims were asserted in the letters; the letters allude only to necessary legal action. This warning does not serve the purpose of a "precise and specific" claim, alerting defendants to still-live claims that would otherwise lapse. These letters are in the nature of a mere reminder, not a claim, *see Diaz de Diana* v. *A.J.A.S. Ins. Co.*, ___ P.R.R. ___ (1980), and do not come within § 5303.[9]

We also decline the invitation to reconsider *Gual Morales* and *Hernandez del Valle*. The three reasons advanced for reconsideration tend to merge. The first reason, the *Tomanio* case, which held that state tolling law applies to the state statute-of-limitations questions that arise in a § 1983 case, is said to require reconsideration because our earlier decisions incorrectly interpreted Puerto Rican law—the second reason for reconsideration—and because those decisions improperly took federal law into account—the third reason. We cannot and do not, of course, dispute *Tomanio*, but we do not believe that *Gual Morales* and *Hernandez del Valle* violated its guidelines. Puerto Rican law does not, contrary to the plaintiffs' assertions, require a wider construction of "extrajudicial claim." Our decision in *Hernandez del Valle* relied on two Commonwealth Supreme Court cases and one federal district court case from Puerto Rico. *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323-24. In addition, the Puerto Rico Supreme Court recently observed that, because the "extrajudicial claim" provision of § 5303 constituted an exception to the extinguishment of actions, it should be construed narrowly. *Diaz de Diana* v. *A.J.A.S. Ins. Co.*, ___ P.R.R. at ___ & n.1. The commenta-

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[9] We have no occasion to consider defendant Ramos' contention that, because the letters were sent to Chardon at the Department of Education, Ramos never received them so that they could not in any event constitute extrajudicial claims as to him.

tors cited by plaintiffs, Diez-Picazo, La Prescripcion En El Codigo Civil 93-95, 130-31; 12 Manresa, Codigo Civil 1242-43 (1973), do not appear to urge a different interpretation. Diez-Picazo does state (in translation) that no particular form is required for an extrajudicial claim but goes on to discuss summonses, letters, and oral claims, matters of form not at issue here. We do not think that we have construed Puerto Rican law improperly.

Nor has federal law been read erroneously into § 5303. Plaintiffs object in particular to a passage in *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323, that states that expansion of "extrajudicial claim" beyond interpretations given by courts in Puerto Rico would undermine the policy of repose underlying statutes of limitation. Plaintiffs' argument is essentially that "policy of repose" is a common law concept that cannot be used in construing the civil code. The commentary concerning tolling that is cited by plaintiffs, Diez-Picazo, *supra*, and Manresa, *supra*, is certainly not inconsistent with the policy of repose, but in any case, it is clear that our decisions in *Hernandez del Valle* and *Gual Morales* rested primarily on a fair reading of Puerto Rican decisions. *Gual Morales* v. *Hernandez Vega*, 604 F.2d at 733; *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 223-24. Plaintiffs also refer us to *Miller* v. *Smith*, 625 F.2d 43 (5th Cir. 1980) (per curiam), and *Brown* v. *Bigger*, 622 F.2d 1025 (10th Cir. 1980) (per curiam), for support for their position here. *Miller* simply reversed and remanded for reconsideration in light of *Tomanio*, a decision with which we already conform; *Brown* v. *Bigger* is to similar effect and does not persuade us to alter our conclusion.

The plaintiffs ask us alternatively to certify to the Puerto Rico Supreme Court the question of the tolling effect of the protest letters. Certification is a matter within the discretion of the court. *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). It is particularly appropriate where a novel and unsettled question of state law is involved, and where the judges on the federal bench are geographically distant from that state or are otherwise unfamiliar with its law. *See id.* at 391; *Gual Morales*

v. *Hernandez Vega*, 604 F.2d at 732-33; *Ruiz Rodriguez* v. *Litton Industries Leasing Corp.*, 574 F.2d 44, 46 (1st Cir. 1978). Among other functions, certification is meant to save "time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros.* v. *Schein*, 416 U.S. at 391.

The cases at bar do not involve a matter of first impression in Puerto Rican law, *cf. Hendrickson* v. *Sears*, 495 F.2d 513, 514 (1st Cir. 1974) (per curiam) (certification of "question of first impression in Massachusetts law"); *Bose Corp.* v. *Consumers Union, Inc.*, 384 F. Supp. 600, 603 (D. Mass. 1974) (same), nor an issue where the law is unsettled, *cf. Hiram Ricker & Sons* v. *Students Internat'l Meditation Soc'y*, 501 F.2d 550, 557-58 n.16 (1st Cir. 1974) (certification where extension of prior Maine decisions was uncertain). The principle that an "extrajudicial claim" must be "precise and specific," *Jiminez* v. *District Court*, 65 P.R.R. at 42, that it must seek the same relief later sought in court, *Gual Morales* v. *Hernandez Vega*, 604 F.2d at 732-33; *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323-24, has already been clearly laid down. We decline, therefore, to certify the issue to the Puerto Rico Supreme Court. *See Daigle* v. *Hall*, 564 F.2d 884, 886 (1st Cir. 1977) ("not particularly difficult" issue of state law does not require certification); *Oppenheimer Mendez* v. *Acevedo*, 512 F.2d 1373, 1375 (1st Cir. 1975) (where Puerto Rico law is clear, certification would be "hollow formality"). In every case, certification would help "build a cooperative judicial federalism," *Lehman Bros.* v. *Schein*, 416 U.S. at 391, by deferring to state courts, but the waste of time and energy in certifying the issue of "extrajudicial claim" here would be too great, *see id.*

Our ruling that the Ortiz Rivera class action tolled the statute of limitations during its pendency and caused it to run anew means that those *Fumero Soto* plaintiffs who received notice of termination within one year before the class action was filed, that is, after June 19, 1977, are not time-barred. The date of notice of termination is the triggering date under *Ricks* and *Rivera Fernandez*, not the protest letters. The *Fumero Soto* plaintiffs who received notice of termination before June 19,

1977, are time-barred. All the *Rivera Fernandez* plaintiffs received notice prior to June 19, 1977, and all those cases are time-barred.

*The Verdict and the Subsequent Order of the District Court*

There are four issues pertaining to the *Fumero Soto* plaintiffs who are not time-barred: whether the district court should have granted defendants' motion for judgment notwithstanding the verdict, Fed.R.Civ.P. 50(b); whether the general verdict should have been set aside because the answers to the special interrogatories were inconsistent with it, Fed.R. Civ.P. 49(b); whether the court erred in ordering the Commonwealth to make payments of back pay to plaintiffs; and whether the court erred in holding that the individual defendants should not pay damages.

To determine the sufficiency of the evidence, it is necessary first to set out the law concerning § 1983 liability. Liability may be grounded on negligence alone. *Parratt* v. *Taylor*, 451 U.S. 527, 532-35 (1981).

> Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

*Id.* at 535. The first element raises several issues, among them whether there is a sufficient causal connection between defendant's acts and the alleged injury. There is also a related, though strictly extraneous issue, whether defendant enjoys immunity from damages, which we discuss below concerning the remedy in the instant cases. With respect to causality, there usually must be an affirmative link between acts of misconduct and plans or policies promulgated by the defendant, *Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976); defendant must commit the constitutional tort himself or "cause" another to

commit the tort, *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 692 (1978). Defendant will be liable for failures to meet his statutory responsibilities that amount to constitutional violations, *DiMarzo* v. *Cahill*, 575 F.2d 15, 17-18 (1st Cir.), *cert. denied*, 439 U.S. 927 (1978), and actual knowledge of the resulting violations is unnecessary. *Id.* at 18 & n.3; *Tatum* v. *Houser*, 642 F.2d 253, 254 (8th Cir. 1981) (per curiam). Plaintiff may prove that defendant was derelict in supervising a subordinate whose acts caused constitutional injury. Such supervisory liability is ill-defined. *See Naughton* v. *Bevilacqua*, 605 F.2d 586, 589 (1st Cir. 1979). A superior will not be liable for undirected, sporadic acts of subordinates, *Layne* v. *Vinzant*, 657 F.2d 468, 471 & n.3 (1st Cir. 1981), but he will be liable where violations are so pervasive that a dutiful supervisor would have notice of them, *Naughton* v. *Bevilacqua*, 605 F.2d at 589. Mere failure to supervise is not a basis for liability under § 1983, *Owens* v. *Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979), citing *Rizzo* v. *Goode*, 423 U.S. 362, but if delinquent supervision is so severe as to amount to gross negligence or deliberate indiffernce to constitutional violations, then liability will result, *Owens* v. *Haas*, 601 F.2d at 1246. "Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978)." *Polk County* v. *Dodson*, 50 U.S.L.W. 4077, 4080 (Dec. 14, 1981).

The evidence, viewed in the light most favorable to the plaintiffs, showed the following. In early May, 1977, a memorandum was sent out over the signature of Virginia Belaval, an assistant to Chardon, to undersecretaries, deputy secretaries, and regional directors in the Department, informing them that nonpermanent positions in the Department would be filled by competition for the 1977-78 school year and that recommendations for retaining current nonpermanent employees should be sent with "appropriate justifications." Ramos and others actually prepared the memorandum, basing it on similar memoranda sent out at this time in earlier years. Chardon saw the memorandum and discussed it with Belaval. Some

recommendations were received. At the end of May, Ramos ordered Julio Cintron Lopez to sign letters of demotion that were going to "clean out" members of the PDP in temporary positions. Cintron Lopez resisted but eventually complied; thereafter he was excluded from activities in the Department. At some point, probably in the summer, Chardon saw some of the letters. The letters had the desired, cleaning-out effect: the demoted plaintiffs were members of the PDP or unaffiliated with the NPP; they were replaced by NPP members. In particular, one regional director told Jose Surillo Rodriguez that he was being demoted because the NPP wanted to place its own member in his position but that Surillo Rodriguez could seek reappointment if he were willing to cooperate with the NPP. When the demoted teachers returned protest letters, Belaval heard their complaints, conducted brief investigations, and discussed some cases with Chardon. Chardon instructed Belaval, however, that unless she could persuade the regional directors to change their recommendations, their decisions would stand. At some time during his tenure as Secretary, Chardon spoke to a group of deputy superintendents and school principals. He was asked about the changes and demotions that had occurred in the Department, and he remarked that the PDP had left a great many "vacuums" or vacancies and that the NPP would take care that PDP members would not fill them. Chardon testified that he was referring only to 300 school director positions that were truly vacant at the time.[10]

This evidence is less than overwhelming, but we believe that it was sufficient to enable the jury to conclude that Chardon and Ramos had the necessary causal connection—or, as Chardon and Ramos put it, "personal involvement"—with the demotions to render themselves liable. Chardon is the more

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[10] Plaintiffs argue incorrectly that evidence available to the jury included defense counsel's "concession" that certain testimony "tied Chardon . . . into the personal involvement pattern." Statements of counsel are not evidence; plaintiffs' more egregious error is that the jury was not in the courtroom at the time the statement was made.

difficult case. He testified about his inability to control employees of the Department, and there was evidence about the Department's "decentralization policy:" accepting the decisions of local (and otherwise inferior) officials as final. The critical evidence was Chardon's statement that the NPP would keep the PDP out of Department positions; the jury was entitled to credit Rivera Fernandez's testimony over Chardon's about the statement. From this, the jury could have concluded that Chardon avoided making changes in or interfering with the Department activities that, under the prevailing policies, he knew would operate to demote employees on the basis of their political affiliation. *See Rizzo* v. *Goode*, 423 U.S. at 371 (need for affirmative link between misconduct and policies implemented by defendants). This is not a case of "the mere right to control without any control or direction having been exercised and without any failure to supervise." *Monell* v. *Department of Social Servs.*, 436 U.S. at 694 n.58.

The case against Ramos is stronger: he took charge of dispatching the demotion letters that he knew would "clean out" PDP members. The jury could have characterized his conduct as an act that directly caused constitutional injury to the plaintiffs.

We affirm the district court's denial of defendants' motion for judgment notwithstanding the verdict.

The next issue, the alleged inconsistency between the answers to the special interrogatories and the general verdict, requires an examination of the court's instructions to the jury. We have no difficulty with the instructions, to which no objections were made. It is necessary, however, to restate certain sections of the charge in order to understand the inconsistency claim and our ruling on damages.

The district court instructed the jury that one of the essential facts plaintiffs had to prove was

> that the defendant demoted him from the position that he held during the '76-'77 school year because of his political affiliation and of his activity in the affairs of the Popular

> Democratic Party or the—a political party other than the NPP.
>
> In other words, that plaintiff's political affiliation or activity in the affairs of his party was a substantial and/or motivating factor in the defendant's decision to demote him back to his permanent status[.]

On the question of immunity, the court instructed:

> The Commonwealth officials who are defendants in this case are not immune from liability for actions taken under Section 1983 if that official knew or should have known that the action taken within his sphere of official responsibility would violate the Constitutional or legal rights of the teachers affected, *or* if the official took the action with the malicious intention of causing a deprivation of Constitutional or legal rights or other injury to the teachers. (emphasis added).

After the case was submitted to the jury, there was a lengthy discussion between the court and counsel as to how damages would be handled if the jury found liability. The court was concerned because "we have got 55 cases, and it is beyond physical endurance for that same jury to come back and try 55 damage trials." During the discussion, the court opined "that there must be a finding of malicious intention to justify punitive damages." Counsel ultimately agreed, with the court's approval, that in the event the jury found defendants liable "that a new or second jury can be summoned to try the respective damages claims." The record does not disclose any discussion of special interrogatories.

After the general verdict was received, the court told the jury that it wanted it to determine "whether or not these acts were done with a malicious intent." It then defined malicious intent:

> Malice is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury or under circumstances that the law will imply an evil intent.
>
> Maliciousness does not necessarily mean actual malice or ill-will, but intentional doing of a wrongful act without legal or social justification.

The jury was then told to answer the following question as to each defendant. "Did the defendant have a malicious intent to deprive plaintiffs of their constitutional or other rights?" There was no objection. The jury answered in the negative as to both defendants and was then discharged. Immediately after the jury left, counsel for the defendants moved for judgment notwithstanding the verdict "pursuant to Federal Rule 52(b)" on the ground that the special findings contradicted the general verdict.

It is Federal Rule of Civil Procedure 49(b) that covers the problem of inconsistencies between special interrogatories and the general verdict. Federal Rule of Civil Procedure 52(b) applies only where findings are made by the court in the first instance. The use of special interrogatories should have put counsel on notice that the provisions of Federal Rule of Civil Procedure 49 applied. Under Rule 49(b),[11] objections to the inconsistency of verdicts must be made before the jury is discharged or by motion to resubmit to the jury. *Skillen* v. *Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981); *see Stancill* v. *McKenzie Tank Lines, Inc.*, 497 F.2d 529, 534-35 (5th Cir. 1974); *Ludwig* v. *Marion Laboratories, Inc.*, 465 F.2d 114, 118 (8th Cir. 1972); *Barnes* v. *Brown*, 430 F.2d 578, 580 (7th Cir. 1970). The purpose of the rule is plain: to promote the efficiency of trials by allowing the original deliberating body to reconcile inconsistencies without the need for a new presentation of evidence to a different body. *Skillen* v. *Kimball*, 643 F.2d at 20. In the case at bar, counsel waited until after the jury was excused before raising the inconsistency claim. Defendants

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[11] Fed.R.Civ.P. 49(b) provides in pertinent part as follows:

*General Verdict Accompanied by Answer to Interrogatories.*

. . . When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

have, therefore, waived their right to have the general verdict set aside on this ground.

Even had defendants not waived their inconsistency claim, we would agree with the district court that the general verdict and the answers to the special interrogatories were not inconsistent. It is clear from reading the record that the district court submitted these questions to determine if punitive damages should be awarded. As the district court pointed out in its lengthy post-trial memorandum, the jury could have based its general verdict of liability on the ground that the defendants knew or should have known that their actions would violate the constitutional or legal rights of the teachers *or* that they acted with malicious intent. Immunity Instruction, *supra*, at 25. We agree with the district court that the only effect of the answers to the special interrogatories was to rule out punitive damages.

We now come to the post-trial order of the district court. In rejecting defendants' motion for judgment notwithstanding the verdict, the court issued two orders. It directed the Department of Education of the Commonwealth to reinstate all plaintiffs to the positions held at the time of their demotions. This order has neither been briefed nor argued on appeal. The court also ordered the Department of Education to pay all plaintiffs full back pay. The court then ruled that "as a matter of law and in light of the jury's factual finding that the defendants did not have a malicious intent to deprive plaintiffs of their rights, the relief herein granted exhausts the remedies and damages available to plaintiffs." Although we can understand the court's desire to dispatch the case in one fell swoop, we think the ruling was erroneous.

We turn first to the back pay award: whether the Commonwealth could be liable for it.[12] We are guided in answering the

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[12] The district court denied defendants' motion to amend the judgment by vacating or rescinding the back pay award on the ground that the motion was untimely. We are not, however, foreclosed from considering defendants' attack on the judgment. *See Evans* v. *Suntreat Growers & Shippers, Inc.*, 531 F.2d 568, 570 (Temp. Emer. Ct. App. 1976).

first question by P.R. Laws Ann. tit. 32, § 3085, which provides as follows:

> Every official, ex-official, employee or ex-employee of the Commonwealth of Puerto Rico who is sued for damages in his personal capacity, when the cause of action is based on alleged violations of the plaintiff's civil rights, due to acts or omissions committed in good faith, in the course of his employment and within the scope of his functions, may request the Commonwealth of Puerto Rico to provide him with legal representation, and to subsequently assume the payment of any judgment that may be entered against his person. Executive Directors, ex-Executive Directors, members and ex-members of the Governing Boards of public corporations and Government instrumentalities, mayors and ex-mayors shall be covered by these provisions, except that for the payment of judgments, they shall be governed by the provisions of section 3092 of this title. Any action brought under the provisions of sections 3077-3084 of this title shall not be covered by the provisions of this section.
>
> Likewise, these provisions shall not be construed, for any reason whatsoever, as making the Commonwealth an insurer of the aforesaid public services, nor as a waiver of the sovereign immunity of the Commonwealth.

Puerto Rico not having waived its sovereign immunity, the award against its Department of Education cannot stand.[13] In a § 1983 action, "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury." *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974). *See Quern* v. *Jordan*, 440 U.S. 332, 341 (1979); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452 (1976). The district court concluded that the back pay award in the *Fumero Soto* cases was nevertheless permissible because it was "ancillary" to the prospec-

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[13] The Commonwealth enjoys the full benefits of the eleventh amendment. *Ezratty* v. *Commonwealth of Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981).

tive relief of reinstatement. We cannot agree. The back pay and reinstatement remedies are entirely distinct; indeed, plaintiffs no longer with the Department of Education and not reinstated were held entitled to back pay. It is plainly retroactive relief requiring the payment of funds from the state treasury. Moreover, "ancillary" monetary relief that is appropriate against a state, *Quern* v. *Jordan*, 440 U.S. at 337, is far different from the relationship between back pay awards and other equitable relief that justifies a grant of back pay against bodies that do not enjoy sovereign immunity, *see Gurmankin* v. *Costanzo*, 626 F.2d 1115, 1121-22 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (approving back pay award as part of remedy in § 1983 and Title VII case) and cases cited therein. It was on this second, looser relationsip that the district court erroneously relied.

Plaintiffs argue that the eleventh amendment proscription does not apply where a state may use federal funds to pay damages. The cases cited are instances where the state could seek reimbursement from the federal government, *Harrington* v. *Blum*, 483 F. Supp. 1015, 1021-22 (S.D.N.Y. 1979), *aff'd*, 639 F.2d 768 (2d Cir. 1980), where a back pay award is at issue and the state job position was federally funded, *Witter* v. *Pennsylvania Nat'l Guard*, 462 F. Supp. 299, 306 n.9 (E.D. Pa. 1978), or where state funds are held in a separate account for an historical society and an award limited to those funds will not affect the state's budgetary decisions, *Morrow* v. *Sudler*, 502 F. Supp. 1200, 1203-04 (D. Colo. 1980). These decisions are arguably sound: where the state will be unaffected by an award, its consent to suit and waiver of sovereign immunity seem unnecessary. These decisions, however, do not reach the instant cases where plaintiffs show that at most state and federal funds are intermingled. *Cf. Florida Dep't of Health & Rehabilitation Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam) (state participation in federally funded public aid program does not amount to waiver of sovereign immunity). The Commonwealth here cannot avoid using state funds to pay the award, and its budget will be

affected. We, therefore, hold the back pay award against the Department of Education barred by the eleventh amendment.

The final issue is the court's ruling that because of the jury finding of lack of malicious intent, plaintiffs were not entitled to any damages from Chardon and Ramos. Unlike most civil rights damage cases, the individual defendants here never asserted a good faith defense. Their defense was that the demotions were for nonpolitical reasons. The district court pointed this out in its post-trial memorandum, and our review of the record confirms its finding. There is, therefore, no question of immunity, absolute or qualified, to be considered. We think the district court's ruling that lack of malice precluded compensatory damages was incorrect. the instructions to the jury, already quoted, and its general verdict rendered the defendants liable for compensatory damages. In *Wood* v. *Strickland*, 420 U.S. 308 (1975), the seminal § 1983 civil rights case on damages against individual defendants, the Court held:

> [T]he appropriate [immunity] standard necessarily contains elements of both ["objective" and "subjective" good faith]. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

*Id.* at 321.

Here, the defense was neither good faith nor ignorance; defendants simply claimed that they did not violate the law. The jury found otherwise. Compensatory damages follow as a matter of course. Denial of punitive damages because of lack of malicious intent is no bar to liability for compensatory damages on the part of defendants who cannot survive the "ignorance or disregard" prong of the *Wood* test. *Cf. Morris* v. *Travisono*, 528 F.2d 856, 857 (1st Cir. 1976) (noting unappealed award of compensatory damages against three defendants but punitive damages against only two); *Smith* v. *Losee*, 485 F.2d 334, 344 (10th Cir. 1973) (en banc), *cert. denied*, 417 U.S. 908 (1974)

(defendant indirectly responsible for political discrimination by other defendants against plaintiff is liable for actual damages but not for punitive damages); *Stolberg* v. *Members of Bd. of Trustees for State Colleges*, 474 F.2d 485, 489 (2d Cir. 1973) (actual but not punitive damages awarded in political discrimination case); *Aumiller* v. *University of Delaware*, 434 F. Supp. 1273, 1311-12 (D. Del. 1977) (against defendant official who cannot invoke qualified immunity plaintiff must still prove malice or wanton disregard of constitutional rights in order to recover punitive damages).

The *Fumero Soto* cases not time-barred must be remanded for a jury trial on compensatory damages.

*Summary*

In Nos. 80-1237, et al., *Rafael Rivera Fernandez et al.* v. *Chardon, et al.*, the judgments are vacated and all the cases are remanded to the district court with instructions to dismiss.*

In Nos. 81-1567 and 81-1607, *Juan Fumero Soto, et al.* v. *Chardon, et al.*, the liability judgment in favor of those plaintiffs who received letters of notice of demotion after June 19, 1977, is affirmed and the matter is remanded for assessment of compensatory damages against the individual defendants, Chardon and Ramos. This is a jury determination unless the parties agree otherwise. The judgment in the cases in which the plaintiffs received letters of demotion prior to June 19, 1977, is reversed and the matter is remanded with instructions to dismiss.

No costs to any party.

*Judgments accordingly.*

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* Judges Campbell and Breyer, not having participated in 81-1567 and 81-1607, join in only so much of the opinion as relates to 80-1237.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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**Civil No. 79-198**

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JUAN FUMERO SOTO,

*Plaintiff,*

v.

CARLOS CHARDON, *et al.*,

*Defendants.*

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**FINAL ORDER AND JUDGMENT**

On May 12, 1981, this Court entered an extensive order directing that plaintiff educators be reinstated to their previous positions in the Puerto Rican school system, and that back pay awards be computed to make plaintiffs whole. After delays caused by defendants' inability to provide this Court with the necessary information in a timely fashion, the Court is now ready to rule on the back pay issue. In 48 of the 55 consolidated cases, the parties have agreed to the proper measure of compensation. Pursuant to the terms of the May order, the Court now orders defendants to pay each plaintiff the amounts agreed upon.

| CASE NO. | NAME | AMOUNT |
|---|---|---|
| 78-1156 | Jose Ortiz Rivera | $6,000.00 |
| 79-67 | Syraida Rosa Cardona | $8,400.00 |
| 79-70 | Carmen L. Negron Marin | $1,800.00 |
| 79-72 | Aida Rodriguez Rios | $2,450.00 |
| 79-73 | Carmen H. Montes Velez | $1,818.75 |
| 79-74 | Carmen Garcia Rosado | $4,545.56 |

| | | |
|---|---|---|
| 79-76 | Noelia Torres de Cantres | $8,332.76 |
| 79-82 | Iraida Sanchez Marquez | $6,000.00 |
| 79-83 | Antonio Rodriguez Rivera | $ 720.00 |
| 79-85 | Edda I. De Ayala Lafuente | $ 196.48 |
| 79-167 | Josefa Marrero Ayala | No back pay |
| 79-169 | Nilsa Cardona Flores | $3,600.00 |
| 79-170 | Jose A. Alvarado | $3,120.00 |
| 79-176 | Elba M. Colon Torres | $1,837.50 |
| 79-179 | Carmen Ortiz Lemois | $7,200.00 |
| 79-182 | Andres A. Hernandez Ortiz | $4,345.00 |
| 79-183 | Aurora Sierra Pizarro | $ 375.00 |
| 79-185 | Virginia Otero Arroyo | $4,350.00 |
| 79-194 | Maria V. Pagan Seda | $1,300.00 |
| 79-197 | Ana Mercedes Ortiz Colon | $7,175.00 |
| 79-198 | Juan Fumero Soto | $1,920.00 |
| 79-199 | Dora Castro de Aguilar | $3,600.00 |
| 79-200 | Antonio Vega Ortiz | $ 300.00 |
| 79-203 | Jose A. Surillo Rodriguez | $1,571.71 |
| 79-206 | Reinaldo Rodriguez Solivan | $9,120.00 |
| 79-209 | Sylvia M. Denis | $6,000.00 |
| 79-210 | Bienvenido Castro Del Valle | $7,200.00 |
| 79-212 | Kremlly Rodriguez Valentin | $2,450.00 |
| 79-213 | Elba Rosario de Bravo | $ 520.00 |
| 79-215 | Lydia Munoz Morales | $ 710.00 |
| 79-218 | Angel Luis Marrero Gonzalez | $1,570.04 |
| 79-219 | Ramon Norat Zayas | $2,050.00 |
| 79-220 | Charles H. Quiles Mariani | No back pay |
| 79-221 | Carmen T. Lugo Sotero | $ 112.50 |

| | | |
|---|---|---|
| 79-224 | Iris Camelia Velez Morales | $5,340.00 |
| 79-227 | Jorge O. Principe Galarza | $3,600.00 |
| 79-323 | Santiago Gonzalez Velazquez | $1,084.96 |
| 79-325 | Bienvenido Rivera Diaz | $1,200.00 |
| 79-330 | Angela Colon Santiago | $2,400.00 |
| 79-332 | Joaquin Cruz Mendez | $2,400.00 |
| 79-333 | Ursula Aguilar Quintero | $8,400.00 |
| 79-334 | Aminta Rivera Cardonna | No back pay |
| 79-335 | Roberto Cruz Cruz | $1,920.00 |
| 79-336 | Nelson Velez Quinones | $2,450.00 |
| 79-357 | Cristina Cancel Cuevas | $1,200.00 |
| 79-358 | Maria D. Guerra Navarro | $2,400.00 |
| 79-361 | Francisco Bonilla Ocasio | No back pay |
| 79-362 | Heriberto Gallardo Gutierrez | No back pay |

In seven (7) cases, the parties have not been able to agree. In two of these cases, 79-79, Efrain Tacoronte Ruiz, and 79-326, Carmen M. Morales Hernandez, the disputes are apparently only upon the proper figure involved, and the differences are comparatively minor. While the Court will not enter a final back pay figure in these two cases without further consultation with counsel, these two plaintiffs are to be granted the reinstatement relief set out in the May order.

Despite the two month period granted to gather information, in one case, 79-66, Carmen Nunez Rivera, defendants have indicated they are uncertain as to her status. The defendants are directed to immediately ascertain whether the suggested back pay figure of $3,600 is correct. If it is, then she should be accorded the same relief as the 48 other cases. Should the defendants continue to disagree as to the amount of back pay, they are directed to promptly notify this Court of that fact and the basis of their disagreement. This plaintiff is to be

accorded the same reinstatement relief as the plaintiffs which have already been discussed.

In 79-164, plaintiff Jose E. Aponte De la Torre claims he was demoted from a position as Vocational Director III to teacher of Industrial Arts. It is ordered that he be reinstated according to the terms of the May order to his former position. The remainder of that case regarding his claim that demotion from one position caused the loss of another part-time position and further damages will require further consultation.

Inasmuch as the pay discrepancy is quite large, the Court will entertain further proceedings to deal with this problem.

Similarly, there are polar differences between the parties' position regarding Nos. 79-329, Juan Rivera Pagan, 79-364, Julio E. Colon, and 79-188, Carmen D. Perez Roman. These plaintiffs contend they were not demoted but dismissed, and have consequently far greater damages. Defendants admit the dismissals, but contend they are unrelated to the political problems found in the main consolidated cases. All relief, monetary and reinstatement, will be stayed in these cases pending further proceedings.

Final judgments will be entered in accordance with the foregoing terms of this order in accordance with F.R.C.P. 54(b).

Filing this order, along with the contemporaneous filing of an order dismissing defendants' final motion to overturn the Court's May 12 order, largely concludes the lengthy and protracted proceedings in these cases. This Court takes the opportunity to reiterate that the reinstatement relief ordered in May is to be provided prior to August 3, 1981, the beginning of the new school year. No stay of that relief will be made by this Court at this late date. The prompt compliance with the terms

of this and the May order will be required and expected of both parties.

Enter July 24, 1981

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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**CIVIL NO. 79-198**

---

JUAN FUMERO SOTO,

*Plaintiff,*

v.

CARLOS CHARDON, *et al.*,

*Defendants.*

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**ORDER**

Defendants have filed on July 6, 1981, their Motion to Vacate or Rescind the Back Pay Award to plaintiffs as contained in the May 12, 1981 order of this Court, together with a supporting memorandum. The basis of this motion is defendants' allegation that such an award would violate the Eleventh Amendment to the United States Constitution as interpreted by *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and its progeny. Prior to and at the trial of this cause, defendants repeatedly raised and were heard upon numerous defenses put forward in motions to dismiss and motions for summary judgment. The issue raised today is one that has already been resolved against defendants by the judges who considered these matters in this case. Judge Torruella dealt definitively with these issues in a decision and order issued September 19, 1980. That order reads in pertinent part:

> Defendants fourth argument is that the claim is barred by the Eleventh Amendment. They argue that the individual Defendants are being sued in their official capacities and that the suit against them is actually one against the Commonwealth of Puerto Rico.
>
> This contention by Defendants is without merit. The Eleventh Amendment does not preclude a suit in federal court to seek relief from the deprivation of constitutional rights by state officials. *Scheuer* v. *Rhodes*, supra; *Ex*

*Parte Young*, 209 U.S. 123 (1908); *Down* v. *Dept. of Public Welfare*, supra. *Ex Parte Young*, the landmark case on this issue, provides that where the action taken is unconstitutional, as alleged herein by Plaintiff, the individual official,

> . . . "is stripped of his official or representative character and is subjected in his person [sic] to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." Id., at 159-160.

**1. Timeliness**

This motion was filed in July, 1981. Trial of the case had been held in late January, early February, 1981 and resulted in a verdict for the plaintiffs. Both parties were permitted the utmost latitude in putting their viewpoint before this Court on defendants' motion for a new trial and for judgment notwithstanding the verdict. An extensive decision and order of the Court denied defendants' judgment notwithstanding the verdict, but limited the plaintiffs to the prospective relief of reinstatement and an award of back pay to make them whole. The parties were directed to meet and provide the Court with the applicable back pay figures. Defendants requested and were granted more time to ascertain the correct amounts. Fully two months after the Court filed its order, defendants now again raise a legal issue seeking to set aside the results. This motion is untimely. This motion should have been made within ten days of the Court's decision. F.R.C.P. 50 and 52. The Court has already considered on the merits one timely motion of defendants seeking to set aside the judgment of this Court. *See* defendants' Motion to Include Additional Findings dated May 22, 1981 and the Court's denial of that motion. Therefore, defendants cannot claim ignorance of the applicable time restrictions.

Nor can this motion's untimeliness be cured by indicating some relevant, late breaking constitutional pronouncement of the Supreme Court. The cases defendants depend upon, *Edel-*

*man* v. *Jordan*, 415 U.S. 651 (1974), *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), and *Quern* v. *Jordan*, 440 U.S. 332, 341 (1979), were all decided prior to pretrial motion practice in this case. While nothing indicates a duty upon this Court to address this motion on the merits, the Court will do so in the alternative, secondary to its ruling that the motion is untimely.

## II. The Merits

The defendants contend at length that federal courts in 42 U.S.C. § 1983 actions "may not include a retroactive award which requires the payment of funds from the state treasury," citing *Edelman* v. *Jordan*, *supra*, at 677. There is no merit in this claim. Defendants admit that the Commonwealth of Puerto Rico is not a party defendant, but go on to claim that the Commonwealth is the "real substantial party in interest." Presumably the Commonwealth stands in this position due to 32 L.P.R.A. § 3085, by which the Commonwealth voluntarily chose to "assume the payment of any judgment that may be entered against his [public officials] person." This voluntary assumption of liability must negate defendants' arguments.

Nor does the defendants characterization of the Eleventh Amendment question make the award of back pay "retroactive" merely by calling it so. The relief requested in this case, reinstatement and back pay, can only be characterized as prospective in nature, satisfying the standard of *Quern* v. *Jordan*, 440 U.S. 322, 336-37 (1979). The back pay relief is merely "ancillary" to the prospective relief of reinstatement. *Id.* at 349, citing *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977). It is not a purely retroactive award requiring unauthorized payments of funds from the Commonwealth Treasury, a cause that would run afoul of *Edelman* v. *Jordan*, *supra*, at 676-77.

Defendants contend that the Supreme Court's admittedly willing authorization of back pay awards against state and local governments in Title VII cases, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), does not indicate that such a back pay award is possible under § 1983. *Albemarle* indicates how

important the Court considers back pay in offsetting the act of discrimination. The Court stated at 422 U.S. at 418-19:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) . . . Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). And where a legal injury is of an economic character,
>
> > "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker* v. *Hoppock*, 6 Wall. 94, 99 (1867).

Dismissal based on political affiliations is not less offensive. *See Elrod* v. *Burns*, 427 U.S. 347 (1976); *Branti* v. *Finkel*, 445 U.S. 507 (1980). Defendants contend that § 1983 does not constitute sufficient authority to allow for a back pay remedy despite the jury's finding of a constitutional violation in this case. In *Gurmankin* v. *Costanzo*, 626 F.2d 1115 (3d Cir. 1980), *cert. denied*, 101 S.Ct. 1375 (1981), the Third Circuit specifically held that a teacher not hired for a constitutionally impermissible reason was fully entitled to back pay against the state agency involved. The Third Circuit concluded that the scope of relief under 42 U.S.C. § 1983 included back pay computed from the date when the teacher was wrongfully not hired. The Court reasoned that "equitable remedies comparable to those deemed appropriate in Title VII employment discrimination cases" was necessary, and to refuse it would be incongruous. *Id.* at 1121.

In *Gurmankin*, the court ruled it an abuse of discretion for the district court not to order back pay. This occurred in a case where public officials had not acted in bad faith, as opposed to

the facts in this case, yet the agency involved was required to make back payments as a result of the unconstitutional conduct.

The Third Circuit's reasoning was previously approved by the Fifth Circuit which has specifically held that back pay is an equitable remedy available in cases dealing with school districts. *Harkless* v. *Sweeny Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). The following portion of that case was cited with approval by the *Gurmankin* court at 1122:

> Section 1983 was designed to provide a comprehensive remedy for the deprivation of federal constitutional and statutory rights. The prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement. Reinstatement involves a return of the plaintiffs to the positions they held before the alleged unconstitutional failure to renew their contracts. An inextricable part of the restoration to prior status is the payment of back wages properly owing to the plaintiffs, diminished by their earnings, if any, in the interim. Back pay is merely an element of the equitable remedy of reinstatement. *See Smith* v. *Hampton Training School for Nurses, supra. See also NLRB* v. *Jones & Laughlin Steel Corp.*, 1937, 301 U.S. 1, 48, 57 S.Ct. 615, 629, 81 L.Ed. 893; *Agwilines, Inc.* v. *NLRB*, 5 Cir., 1936, 87 F.2d 146, 151.

For these reasons, the defendants' July 6, 1981 Motion to Rescind the Back Pay Award is denied.

Enter July 24, 1981

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

---

**CIVIL NO. 79-198**

---

JUAN FUMERO SOTO,

*Plaintiff,*

v.

CARLOS CHARDON, *et al.*,

*Defendants.*

---

**ORDER**

Defendants' motion for judgment notwithstanding the jury's verdict has required a detailed examination of the jurisprudence regarding qualified immunity of state officials from damages. For the reasons stated in the following Memorandum, the defendants' motion for judgment notwithstanding the verdict is denied.

The Court exercises its equitable power to order that the Commonwealth of Puerto Rico Department of Education reinstate all those plaintiffs who have remained in their employ to the respective positions each held, or its functional equivalent, at the time of their demotion.[1] This reinstatement may be accomplished in accordance with the dictates of sound administrative practices. Therefore, reinstatement may be delayed until the end of the present school year, but not later than the start of the next school year.

The Department is further ordered to pay plaintiffs' full back pay in the amount to be computed in each case,[2] and to take all other affirmative relief necessary to make the plaintiffs whole. Any delay in reinstatement pursuant to the administrative practices described above will not vitiate the requirement that back pay be awarded up to and including the time reinstatement takes place. Those teachers who chose to leave the De-

partment will be allowed back pay calculated for the period they were in reduced positions until they voluntarily terminated their teaching positions.

However, as a matter of law and in light of the jury's factual finding that the defendants did not have a malicious intent to deprive plaintiffs of their rights, the relief herein granted exhausts the remedies and damages available to plaintiffs. Despite the bifurcation of this trial into liability and damage elements, the jury's findings vitiates the need to hold damage trials.

With respect to any claim for which no statute of limitation defense was pending, final judgment will enter pursuant to Fed.R.Civ. P. 54(b), once the filing requirements of Notes 1 and 2 shall have been complied with and approved by the Court.

The Court will consider a petition for plaintiff's attorney's fees, along with the appropriate briefing and documentation of time involved when final judgment has been entered according to the terms of this Order.

**Notes**

(1) In approximately 10-15 of these cases, defendants have asserted a defense that the claims were barred by the applicable statute of limitations. This defense was specifically reserved when these cases were consolidated. This issue is presently before the Court of Appeals for the First Circuit in related "Chardon" teacher discrimination cases. This Court will await that decision before dismissing the complaints or entering judgment on behalf of the individual plantiffs therein, pursuant to this Court's Memorandum Order of January 28, 1981.

The parties are directed to meet at the earliest possible time for the purpose of providing this Court with a list of those cases where judgment can be immediately entered in accordance with this Order, and those which would be controlled by the ruling of the Court of Appeals. This list shall be filed with the Court within 30 days of the filing of this Order. If the parties

are not in agreement on a particular case, they will immediately note the basis of their disagreement, specifying the date the demotion letter was sent, the date received, and the date the particular complaint was filed. The Court will consider any supplemental information the parties deem appropriate.

(2) The calculation of the back pay amount should not require the intervention of the Court. The parties are directed to meet and calculate the amount owed each plaintiff. A list setting forth the amount due each plaintiff must be filed within 30 days of the filing of this Order. Judgment will then be entered accordingly.

SO ORDERED.

ENTER: May 7, 1981

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

**Juan Fumero SOTO, Plaintiff,**

**v.**

**Carlos CHARDON et al., Defendants.**

**Civ. No. 79-198.**

United States District Court,
D. Puerto Rico.

May 7, 1981.

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Hiram Cancio, Jaime R. Nadal Arcelay, Jesus R. Rabell Mendez, Blanca Mera Roure, and Cancio, Nadal & Rivera, Hato Rey, P.R., for plaintiff.

Robert Cordova, Sally de Jesus Kellogg, San Juan, P.R., Ines Equia Miranda de Casanova, Puerto Rico Dept. of Justice, San Juan, P.R., for defendants.

**MEMORANDUM**

GRANT, Senior District Judge, sitting by designation.

Fifty-five school teachers and administrators, plaintiffs in these 55 consolidated cases, brought individual suits charging that they were unlawfully discriminated against and demoted due to their association with and membership in the Popular Democratic Party (PDP), a political party in the Commonwealth. Each plaintiff's theory is that Carlos A. Chardon, then Secretary of Education for the Commonwealth, and his Assistant Secretary for Personnel, Oscar Ramos, members of the governing New Progressive Party, unlawfully demoted each of the plaintiffs at dates ranging from May till June of 1977, in violation of the First and Fourteenth amendments, 42 U.S.C. § 1983, and various Puerto Rican statutes. 18 L.P.R.A. §§ 249e,[1] 211 and 214 *et seq.* Actions under Puerto Rican law

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[1] 18 L.P.R.A. § 249e prohibits school officials from making personnel changes based on an employee's political affiliation.

come within both § 1983 and its jurisdictional predicate, 28 U.S.C. § 1343(3). *Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976). It is impermissible to discriminate in the work place based upon a person's political affiliations. *Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti* v. *Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).[2] These suits were brought against Chardon and Ramos in their individual and official capacities.[3]

Before trial, the individual plaintiffs, each represented by the same group of attorneys, indicated that a large portion of their proof at trial would consist of establishing a pattern of unlawful discrimination, requiring repetitious testimony from a number of plaintiffs. Inasmuch as the factual and legal issues, the attorneys and the parties were common to all these cases, these suits were ordered consolidated pursuant to Fed.R. Civ.P. 42(a). Subsequently, other judges in this district transferred a number of "Chardon" cases for inclusion in the consolidated trial. This trial was bifurcated, and was to consider only the liability issues. Fed.R.Civ.P. 42(b). *See* Court Order, January 1981. In essence, the jury's findings on the issue of liability in this captioned case was made binding upon the parties in all of the consolidated cases. The damages issues were not consolidated.

Each of the plaintiffs herein was demoted from the position of school principal or other supervisory position in which he or

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[2] The affirmative defense that the plaintiffs were confidential or policymaking employees, and hence, not protected from discharge, was not raised as an issue in this case.

[3] Since Chardon resigned as Secretary before trial, the new Secretary of Education is automatically substituted in her official capacity for Chardon, Fed.R.Civ.P. 25(d). The caption has not been formally changed to reflect this. Chardon, of course, remains a defendant in his individual capacity.

she did not have tenure. Upon demotion as ordered by the Department he or she was returned to the tenured position as school teacher or to lesser administrative rankings, as previously occupied. No one was discharged. While the complaints of most teachers requested declaratory relief, reinstatement, back pay and punitive damages, approximately ten to fifteen suits were filed by teachers who chose to leave the Department during the pendency of these lawsuits. These ex-teachers were no longer interested in the equitable relief of reinstatement, but in turn sought a more substantial monetary judgment than those who remained employees of the Department.

These cases were tried to a jury. With the agreement of counsel, the following instruction was given pertaining to the defendants' affirmative defense that they had acted in good faith while demoting each plaintiff, and thus were protected by a qualified official immunity:

> We have made reference to the affirmative defense of good faith and a qualified immunity.
>
> The jury is instructed that the defendants were each public officials of the Commonwealth of Puerto Rico. They were acting in their official capacity at all times pertinent to this case.
>
> And, as such, they did enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary.
>
> It is the existence of reasonable grounds for the belief formed and acted upon at the time, and in light of all the circumstances, coupled with a good faith belief, that affords a basis for a qualified immunity of State officials for acts that are performed in the course of their official conduct.[4]
>
> The Commonwealth officials who are defendants in this case are not immune from liability for actions taken under

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[4] This paragraph is taken from *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974).

> Section 1983 if that official knew or should have known that the action taken within his sphere of official responsibility would violate the Constitutional or legal rights of the teachers affected, *or if the official took the action with the malicious intention of causing a deprivation of Constitutional or legal rights or other injury to the teachers.*[5] (emphasis added).

The jury returned a verdict for the plaintiff and against each defendant. The Court then defined malicious intent,[6] and requested that the jurors return to their deliberations to answer the following interrogatory:

> Following a finding by the jury that the defendants Carlos Chardon and Oscar Ramos, individually and in their official capacities are liable to the plaintiffs in this consolidated cause, the jury is now instructed to deliberate further for the sole purpose of answering this question: Did the defendant Carlos Chardon *have a malicious intent to deprive plaintiffs of their constitutional or other rights?*
>
> And a similar question with respect to the other defendant: Did the defendant Oscar Ramos *have a malicious intent to deprive the plaintiffs of their constitutional or other rights?* (emphasis added).

The jurors answered "No" with respect to each defendant. No objection was made regarding this interrogatory. It is noted here that the language in the prior charge and the special interrogatory is identical. The Court now must give effect, if

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[5] This paragraph is taken from *Wood* v. *Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000-1001, 43 L.Ed.2d 214 (1975).

[6] I am going to read to you a definition from a couple of cases as to what that constitutes.

"Malice is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury or under circumstances that the law will imply an evil intent."

And the other, from the other case, I read as follows: "Maliciousness does not necessarily mean actual malice or ill-will, but intentional doing of a wrongful act without legal or social justification."

possible, to both the general verdict for plaintiff, and the interrogatory answer that defendants lacked malicious intent.

**(I) *Punitive Damages***

The Supreme Court has construed 42 U.S.C. § 1983 to allow an award for compensatory damages. It has not, as yet, definitively ruled as to whether punitive damages are also available:

> To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, *there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.* See *Imbler* v. *Pachtman*, 424 U.S. 409 at 442, 96 S.Ct. 984 at 1000, 47 L.Ed.2d 128 (White, J., concurring in judgment).

*Cary* v. *Piphus*, 435 U.S. 247, 256-57, 98 S.Ct. 1042, 1048-1049, 55 L.Ed.2d 252 (1978) (emphasis added) (footnote omitted). The footnote following this holding further explained the Court's position:

> *This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights.* See, *e.g.*, *Silver* v. *Cormier*, 529 F.2d 161, 163-164 (CA10 1976); *Stengel* v. *Belcher*, 522 F.2d 438, 444 n.4 (CA6 1975), cert. dismissed, 429 U.S. 118 [97 S.Ct. 514, 50 L.Ed.2d 269] (1976); *Spence* v. *Staras*, 507 F.2d 554, 558 (CA7 1974); *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (CA1), cert. denied, 393 U.S. 940 [89 S.Ct. 299, 21 L.Ed.2d 276] (1968); *Mansell* v. *Saunders*, 372 F.2d 573, 576 (CA5 1967); *Basista* v. *Weir*, 340 F.2d 74, 84-88 (CA3 1965). Although we imply no approval or disapproval of any of these cases, we note that there is no basis for such an award in this case. *The District Court specifically found that petitioners did not act with a malicious intention to deprive respondents of their rights or to do them other injury, see n.6, supra, and the Court of Appeals approved only the award of "nonpunitive" damages, 545 F.2d 30, 31 (1976).*
>
> We also note that the potential liability of § 1983 defendants for attorney's fees, see Civil Rights Attorney's Fees

> Awards Act of 1976, Pub.L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988, provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights. See also 18 U.S.C. § 242, the criminal counterpart of § 1983.

*Id.* at 257 n.11, 98 S.Ct. at 1049 n.11 (emphasis added).

The Court of Appeals for the First Circuit has held that punitive damages are available against § 1983 defendants "when there are aggravating circumstances." *Fact Concerts, Inc.* v. *City of Newport*, 626 F.2d 1060, 1067 (1st Cir. 1980), citing *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (bad faith) and *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940, 89 S.Ct. 299, 21 L.Ed.2d 276 (1968) (unwarranted invasion of privacy). In *Rosado*, *supra*, it was stated: "[I]ntentional interference with constitutional rights, standing alone, is not enough; there must also be 'aggravating circumstances.' " 562 F.2d at 121. Citing the standards used by other circuits, the *Rosado* court continued: "and the Third Circuit has described the standard as 'malicious and wanton disregard' of a plaintiff's rights." *Id.* (citation omitted).

The jury's answer to the interrogatories in this case ended any claim for punitive damages. As the plaintiff's attorneys acknowledged, the award of punitive damages is a decision for the trier of fact. Although the parties failed to raise the issue, any decision granting or denying punitive damages must include an assessment of the conduct in question, evidentiary inferences and evaluations pertaining to motive and knowledge. *Alicea Rosado* v. *Garcia Santiago*, *supra*. *See also Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970). *See also* Annot., 14 A.L.R.Fed. 608 (1970). It became apparent that failure to have questioned this liability jury regarding the defendants' intent would have required a full repetition of the liability trial testimony in any subsequent trial on the issue of punitive damages. However, based upon the jury's findings, no punitive damages can now be awarded. With this in mind, the Court will now address defendants'

contention that the jury's interrogatory answers unwittingly opened the door to an inconsistent verdict.

**(II) *The Motion For Judgment Notwithstanding The Verdict***

Defendants moved for a directed verdict at the close of the evidence offered by plaintiff, and again at the close of defendants' evidence on the official immunity defense. The Court reserved its decision upon that motion. After the jury's answer that defendants lacked a malicious intent, defendants moved for judgment notwithstanding the verdict. Defendants contend that these answers entitle them to prevail in their affirmative defense of qualified immunity, and that the general liability verdict is contradicted by the interrogatory answers to the effect that defendants had no malicious intent. In the alternative, they claim as a matter of law that the answers bar any subsequent claim for damages from the individual defendants.

The Court is not persuaded in the first instance that the findings are contradictory. To that extent, judgment notwithstanding the verdict is denied. The Court is persuaded, however, that the jury's answers do preclude the award of damages against the defendants in their individual capacity based upon an independent question of law.

The standard for ruling on a motion for judgment notwithstanding the verdict is the same as the standard for a directed verdict motion. The district court is to review the evidence in the light most favorable to the prevailing party, giving the plaintiff here the benefit of all the factual inferences that the evidence fairly supports without weighing the credibility of the witnesses. Fed.R.Civ.P. 50(b). *Fact Concerts, Inc.* v. *City of Newport, supra*, 626 F.2d at 1064. *See also Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962); *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-80, 64 S.Ct. 232, 234-235, 88 L.Ed. 239 (1943). Reviewing the testimony presented in this case by that standard, the Court cannot conclude that the evidence presented was insufficient to permit a rational jury from reaching

both the verdict of liability and finding on the lack of malicious intent. Therefore, under the applicable standard the Court must effectuate both the general verdict and interrogatory answers. At this point, however, the Court must state its view of the evidence that was presented. The evidence of political discrimination and the defendants' personal involvement in the demotions was not overwhelming. Candidly, a reasonable man could have found the plaintiff's proof unconvincing. The Court will not invade the jury's province to substitute its credibility determinations and reach an alternative judgment. But in this case the jury had two bites of the apple so to speak, and both must be harmonized by the Court, if possible, under a fair reading of the answers. Fed.R.Civ.P. 49(b). *See Gallick* v. *Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 119, 83 S.Ct. 659, 666, 9 L.Ed.2d 618 (1963).

Fed.R.Civ.P. 49 and the cases which construe it indicate that, "[W]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962). Although that case discussed Rule 49(a), while this case arises under Rule 49(b), the principles expressed remain equally valid. In fact, if the difference between the general verdict and interrogatory answers is perceived as possibly inconsistent, the general admonition is that the answers to special interrogatories should control, rather than the general verdict.[7] The power to enter judgment on findings inconsistent with the general verdict "is a constitutional one

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[7] *Blackwell* v. *Cities Service Oil Co.*, 532 F.2d 1006 (5th Cir. 1976); *Nimnicht* v. *Dick Evans, Inc.*, 477 F.2d 133 (5th Cir. 1973); *Elliott* v. *Watkins Trucking Co.*, 406 F.2d 90, 92 (7th Cir. 1969); *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379, 406 07 (9th Cir.), *cert. dismissed*, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964); *United States* v. *City of Jacksonville, Arkansas*, 257 F.2d 330 (8th Cir. 1958); *Golden North Airways, Inc.* v. *Tanana Publishing Co.*, 218 F.2d 612 (9th Cir. 1954).

and does not violate the Seventh Amendment since the jury's findings of fact are not being reexamined but, as a reasonable regulation of practice, their more specific findings of fact are allowed to control their general conclusion embodied in the general verdict." 5A Moore's Federal Practice ¶ 49.04; Wright and Miller, Federal Practice and Procedure: Civil § 2513. In summary, while harmonizing the answers the more general liability verdict must give way to the more specific lack of intent finding. This principle will be borne in mind when the qualified immunity issues are considered.

**(III) *Qualified Immunity From Damages***

**A. *Liability***

The nature of the qualified immunity defense at common law and in § 1983 cases has been judicially established commencing with *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).[8] In *Scheuer*, the Governor of Ohio, the University President and National Guard officers involved in the Kent State University killings claimed absolute official immunity from damages under § 1983. This discussion is of particular significance in the case before us inasmuch as *Scheuer* addresses the scope of immunity available to state executive officials occupying positions of authority analogous to those held by the defendants here. The Court began by noting the reasons why officials had been held immune from suits for personal damages at common law:

> The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the "King can do no wrong"—did not protect all government officers from *per-*

[8] The Court has made clear that immunities under § 1983 are to be read in harmony with the general principles of tort immunities and defenses. *Imbler* v. *Pachtman*, 424 U.S. 409, 418, 96 S.Ct. 984, 989, 47 L.Ed.2d 128 (1976). *See also Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

*sonal* liability, *the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability.* This official immunity apparently rested, in its genesis, on two mutually dependent rationales: *(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.*

416 U.S. at 239-40, 94 S.Ct. at 1687-1688 (emphasis added) (footnotes omitted).

In holding that a qualified official immunity exists, Justice Harlan's prior admonitions on this subject were restated, followed by the Court's holding.

"To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas*, *supra*, [161 U.S. 483] at 498 [16 S.Ct. 631 at 637, 40 L.Ed. 780]—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. 360 U.S., at 573-574, [79 S.Ct. at 1340-1341]."

*These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.* It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that

> affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

*Id.* at 247-48, 94 S.Ct. at 1692 (emphasis added).

In this case, plaintiff concedes that a qualified official immunity clothed both Chardon and Ramos inasmuch as the Commonwealth's Secretary of Education is given practically limitless discretionary powers in the personnel area. 18 L.P.R.A. § 211 *et seq.* While this discretionary power cannot be used to ratify political discrimination in promotion and demotion policies, the *Scheuer* Court apparently contemplated a de facto "sliding scale" of qualified immunity protection for public officials. In *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Court again confirmed that like the state cabinet officials and state governor in *Scheuer*, the federal cabinet appointee in *Butz* deserved the highest level of protection from suits against him, *i.e.*, below the level of absolute immunity. Implicitly, this requires a heightened degree of knowledge, personal participation and malice by the higher executive official in an allegedly discriminatory action. *See also Williams* v. *Anderson*, 562 F.2d 1081, 1101 (8th Cir. 1977).

*Scheuer* was followed by *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), which examined the scope of immunity for members of a school board in disciplinary proceedings. Essentially, the Court again sought to steer between the two weighty and competing concerns in this area—making public officials responsible for violating citizen's constitutional rights, without emasculating the officials' power, and will, to make difficult or unpleasant decisions when necessary. *See also Butz* v. *Economou*, *supra*, 438 U.S. at 503, 98 S.Ct. at 2909.

Comparing the *Scheuer* defendants with the *Wood* officials, the latter occupied much lower executive positions. The *Scheuer* analysis would indicate that a lesser degree of qualified immunity would be sufficient to protect the *Wood* defendants. The "variation" in the scope of the immunity accorded the

officials in *Scheuer* was at a low ebb in *Wood* v. *Strickland* for this reason. In *Wood* the Court held:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 *if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional or other injury to the student.*

*Id.*, 420 U.S. at 322, 95 S.Ct. at 1001 (emphasis added).

In the present case, the jury was instructed, without objection, in accord with this dual *Wood* standard. Parsing this standard, the "should have known" language can be characterized as a negligence standard. It is an objective measure of the defendants' conduct, although the "knew" portion is subjective in the sense that it requires an examination of the defendants' state of mind. Via the conjunctive "or" the Court connected the second branch to the *Wood* standard, a subjective intent test which inquires whether the official maliciously intended to injure the plaintiff. Based upon the jury's answer to the special interrogatory, there was no such impermissible intent in this case. Therefore, the "knew or should have known" standard is the branch plaintiffs must depend upon here.

The compelling policy dilemma of the immunity decisions is the need to balance the plaintiff's compensation for injuries with the need to protect the decision making process. *Barr* v. *Mateo*, 360 U.S. 564, 565, 79 S.Ct. 1335, 1336, 3 L.Ed.2d 1434 (1959). To complicate any analysis under the *Wood* holding, however, the Court has left further instructions which must be integrated with the liability analysis.

**B. *Damages***

As noted in *Wood:*

> *Liability for damages for every action which is found subsequently to have been violative of a student's con-*

> *stitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties.* School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations. Denying any measure of immunity in these circumstances "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray, supra*, 386 U.S., [547] at 554, 87 S.Ct., [1213] at 1218 [18 L.Ed.2d 288]. *The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.* The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.

420 U.S. at 319-20, 95 S.Ct. at 999-1000 (emphasis added) (footnote omitted).

In addition to the *Scheuer* and *Butz* "sliding scale" of immunity, and the *Wood* liability standard, the Court has indicated here that merely satisfying the *Wood liability test* may not be sufficient to allow an award of *damages*. Once liability exists, damage awards still depend to some degree on the subjective determination of whether the official acted in good faith, *e.g.*, whether the "mistaken" constitutional deprivation is reasonable or unreasonable. Rather than only one standard by which to provide a readily discernible litmus test to judge official immunity, it is apparent from the Court's opinion that the analysis regarding damages is more complicated. An official could make a "reasonable" mistake protected by official immunity, a mistake which might otherwise constitute an actionable violation of 42 U.S.C. § 1983.

The Court concluded the *Wood* analysis by making the following admonition regarding damages:

> *A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.*

*Id.* at 322, 95 S.Ct. at 1001 (emphasis added).

Before evaluating the verdict and interrogatory answers in light of the *Wood* damage holdings, it appears that integrating these damage teachings with the liability standards yields a presumably unintended conflict. Under § 1983 and the *Wood* liability standard of "knew or should have known," liability can exist for non-deliberate conduct. However, in the absence of an impermissible motivation, or deliberate disregard for citizen's rights, damages should not be awarded. The conflict does not stem from faulty analysis, but is a product of the requirement that a balance be struck which protects both citizens and officials. In effect, qualified immunity protects officials like Chardon and Ramos from damages even when they objectively should have known that violations of constitutional rights were occurring, but where they took these actions in the absence of malicious or bad motivation. While a specific answer to the question of whether the mistake was "reasonable" or "unreasonable" would clearly answer this concern, no jury finding exists on that question.

Although the Supreme Court has specifically limited the *Wood* v. *Strickland* decision to the context of school discipline, *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), these damage teachings have been expanded upon and utilized in other areas. Rather than slavishly utilizing the *Wood* v. *Strickland* decision, these cases indicate that the standard for awarding damages against officials is higher than mere negligence on the part of the official involved.[9]

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[9] The Supreme Court has left open the question of whether negligence on the part of state officials is sufficient to constitute a constitutional violation. *See Baker* v. *McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). The cases collected in *Bonner* v. *Cough-*

The appropriate test, drawn from the Supreme Court's opinions, was stated by the Seventh Circuit in *Thomas* v. *Pate*, 516 F.2d 889, 891, n.2 (7th Cir.), *cert. denied*, 423 U.S. 877, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975), and again restated as the holding of *Bonner* v. *Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed.2d 529 (1978) (footnote omitted):

> [A] plaintiff must prove that the defendant has acted within the sphere of his official responsibility, "with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff] or "with such disregard to the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

Neither test is satisfied here. First, the jury finding that there was no malicious intent precludes the Court from finding the officials acted out of an impermissible motivation. Nor does the evidence presented at trial support such a proposition.

Second, plaintiff claims that defendants objectively acted with a deliberate disregard of his established constitutional rights, *e.g.*, the employee's right not to be discharged for his political affiliations. As an example, plaintiff cites *McCormick* v. *Edwards*, 479 F.Supp. 295 (M.D.La.1979), where the district court ruled that public officials could not rely on their subjective claim that they had acted in good faith, while pleading ignorance of clearly established due process rights. The defendants in that case knew of the due process rights but claimed not to know these rights applied to the plaintiff. *Id.* at 299.

This type of analysis is not helpful in the case at bar where Chardon and Ramos have never claimed ignorance of the law,

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*lin*, 545 F.2d 565, 568 n.8 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed.2d 529 (1978), indicate the majority view is that mere negligence is not enough. The First Circuit holding is to that effect. *Page* v. *Sharpe*, 487 F.2d 567 (1st Cir. 1973). *See also Bogard* v. *Cook*, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883, 100 S.Ct. 173, 62 L.Ed.2d 113 (1979).

or of the teacher's right not to be discharged for his political affiliations. Defendants do not claim good faith in light of an unexpected, late-breaking constitutional doctrine as discussed in *Woods*. Their theory throughout this litigation has been that the demotions were for non-political reasons, and that their personal role in these decisions, particularly Secretary Chardon's, was extremely limited. Although plaintiff is correct in asserting that the right in question is a clear proposition of constitutional law it is proof of motive that is the key to unlocking this case.

The burden of proving what can conveniently be analogized as the two-sided qualified immunity coin, with proof of the officials' good faith on one side, or proof of their bad faith on the other, has been seen as mutually exclusive propositions. The First Circuit succinctly stated this in *Gomez* v. *Toledo*, 602 F.2d 1018, 1020 (1st Cir. 1979), *rev'd*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980):

> It has now been firmly established by a long line of cases that in a civil rights action for damages, public officials acting in their official capacity enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary. *Or to put it conversely*, a plaintiff in such an action must prove that the public official acted in bad faith, meaning with malice or recklessness. *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 [94 S.Ct. 1683, 40 L.Ed.2d 90] (1974); *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).[10]

(emphasis added).

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[10] The Supreme Court has not passed upon the burden of proving, as opposed to pleading, the official immunity defense. The First Circuit originally had charged the plaintiff with the burden of pleading and proving bad faith on the part of the officials involved. *Gomez* v. *Toledo*, 602 F.2d 1021 (1st Cir. 1979). This decision was reversed

In this case, defendants contend that the finding that they did not act with a malicious intent is tantamount to a finding that they acted in good faith. If such were the case, defendants would have succeeded in proving that they are clothed with a qualified immunity in this case. Likewise, plaintiff contends that the general liability finding constitutes a finding of bad faith in the objective sense, although they concede that the jury found the defendants did not have the subjective intent to deprive plaintiffs of their rights. Candidly, these admittedly less than definitive findings do not yield what either party would like them to. A finding that the defendants objectively "knew or should have known" discrimination was occurring may be sufficient for a general finding of liability but it does not satisfy the requirements for damages. Defendants proffered and the jury accepted proof that they did not act with a malicious intent. This does not, however, indicate that they acted in good faith.

The peculiar context of the present case simply does not permit the expected converse finding, discussed by the First Circuit, to occur. Instead, readily discernible elements of each alternative appear and can be rationalized to yield a coherent result. This result, however, convinces us that further legal damages cannot be awarded.

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by the Supreme Court which held that § 1983 plaintiffs did not have to anticipate what is an affirmative defense, *i.e.*, the good faith actions of the officials involved, by pleading that they acted in bad faith. *Gomez* v. *Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). Justice Rehnquist concurred in the Court's otherwise unanimous opinion, but noted his belief that the burden of persuasion, apart from the burden of pleading, remained undecided.

The Court cited several cases to indicate that the burden of persuasion lies with the officials. *McCray* v. *Burrell*, 516 F.2d 357, 370 (4th Cir. 1975) (en banc), *cert. dismissed*, 426 U.S. 471, 96 S.Ct. 2640, 48 L.Ed.2d 788 (1976); *Gilker* v. *Baker*, 576 F.2d 245 (9th Cir. 1978); cited in *Gomez* v. *Toledo*, 446 U.S. at 638 n.5, 100 S.Ct. at 1922 n.5. No contrary rulings were cited.

Further research disclosed a number of cases which leave the burden of proving good faith to the defendant officials. When *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) was remanded, the Second Circuit placed the burden on the police officers to show they had reasonable beliefs regarding the legality of their actions. 456 F.2d 1339, 1347-48 (2d Cir. 1972). *See also Thompson* v. *Burke*, 556 F.2d 231 (3d Cir. 1977); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 61-62 (3d Cir.), *cert. denied*, 429 U.S. 979, 97 S.Ct. 490, 50 L.Ed.2d 588 (1976); *Bryan* v. *Jones*, 530 F.2d 1210 (5th Cir.) *(en banc)*, *cert. denied*, 429 U.S. 865, 97 S.Ct. 174, 50 L.Ed.2d 145 (1976); *Glasson* v. *City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975); *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732 (3d Cir. 1973); *Benford* v. *American Broadcasting Companies, Inc.*, 502 F.Supp. 1148 (D.Md.1980); *Fujiwara* v. *Clark*, 477 F.Supp. 822, 832 (D.Haw.1979); *Eckerd* v. *Indian River School District*, 475 F.Supp. 1350, 1368 (D.Del.1979); *Cameron* v. *Montgomery County Child Welfare Service*, 471 F.Supp. 761, 764 (E.D.Pa.1979); *Forsyth* v. *Kleindienst*, 447 F.Supp. 192, 202 (E.D.Pa.1978), *modified on other grounds*, 599 F.2d 1203 (3d Cir. 1979); *Eubanks* v. *Clarke*, 434 F.Supp. 1022, 1033-34 (E.D.Pa.1977); *Mack* v. *Johnson*, 430 F.Supp. 1139, 1147 (E.D.Pa.1977), *aff'd*, 582 F.2d 1275 (3d Cir. 1978); *Burkhart* v. *Saxbe*, 397 F.Supp. 499, 502 (E.D.Pa.1975).

In this case, the burden of proof on the qualified official immunity defense was allocated to the defendants. This instruction was accepted without protest by both parties. Therefore, they are bound by it. Fed.R.Civ.P. 51. *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 808, 69 S.Ct. 1326, 1330, 93 L.Ed. 1704 (1949) (civil case); *Johnson* v. *United States*, 318 U.S. 189, 200, 63 S.Ct. 549, 554, 87 L.Ed. 704 (1943); *United States* v. *Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936); 5A Moore's Federal Practice 51.04 at 51-28, 51-30 to 51-35; *Redmond* v. *Baxley*, 475 F Supp. 1111, 1115 (E.D.Mich.1979).

If the proof of the parties is less than definitive upon the defense of qualified official immunity, then the policy concerns of *Scheuer* and *Wood*, the need to protect the decision making powers of public officials, particularly state cabinet members, comes to the fore. The case at bar presents at best ambiguous findings regarding the motivation these officers brought to this situation. In such an ambiguous case, where the Court can exercise its equitable powers to make plaintiffs whole, further damages are not warranted.

This comports with the Supreme Court's instructions regarding § 1983 damages. Although by its own terms § 1983 creates a species of tort liability that admits of no immunities, *Owen* v. *City of Independence, Missouri*, 445 U.S. 622, 650-51, 100 S.Ct. 1398, 1415-1416, 63 L.Ed.2d 673 (1980), qualified immunity for public officials has been a product not of legislation, but of "judicial thinking" upon the conflicting policies involved. *Butz* v. *Economou*, *supra*, 438 U.S. at 501-02, 98 S.Ct. at 2908. Applying this judicially created immunity in accord with the dictates of prior decisions, if damages are not limited we run the risk of "dampen[ing] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, Judge).

Where the Supreme Court has considered the role of damages as compensation for violations of constitutional rights, it has indicated that restraint is recommended. Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Justice Harlan further noted, "[F]or people in Bivens' shoes it is damages or nothing." *Id.* at 410, 91 S.Ct. at 2012. That is not the case here. As will become clear, the plaintiffs here can be given the bulk of the relief sought via equity, without infringing upon the policy concerns discussed by the Court in the qualified official immunity cases. Because that is the case, the efficacy of protecting the official's

decision making power deserves full concern, in accord with the teachings of the Supreme Court. For these reasons, no further proceedings to establish damages are necessary, nor can any be awarded in this case.

**(IV) *Injunctive Relief***

While the scope of the qualified immunity defense prohibits the further award of damages, the question of whether equitable relief may be granted poses an entirely different issue. The dominant policy concern which prohibited damages, *i.e.*, the potential chilling effect upon decision makers, is no longer present. The impact that this has on the efficacy of allowing relief was touched upon, albeit briefly, by the Court in *Wood* v. *Strickland*, 420 U.S. at 314-15 n.6, 95 S.Ct. at 996-997 n.6, which stated in part, "[I]mmunity from damages does not ordinarily bar equitable relief as well."

A more definitive examination of this reasoning can be found in *Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974). In that case, a class action filed by persons arrested, assaulted, and expelled from a speaking engagement of then President Nixon, sought declaratory relief against similar actions in the future. The district court found the law enforcement officers involved had no constitutional basis for their actions, and granted a preliminary injunction on plaintiff's behalf. The Court of Appeals rejected the officials' defense of qualified official immunity. Referring to *Barr* v. *Mateo* and *Scheuer* v. *Rhodes* (the same portions of which have been restated again in this memorandum, *supra*) the Fourth Circuit indicated its reasons for upholding injunctive relief:

> These two quotations demonstrate that the immunity rule, whatever its scope, is grounded upon the inhibitory effect of suits for money damages. Manifestly, actions for injunctive relief do not have that effect. The federal defendants have cited no case, and we have found none, which holds that the immunity doctrine insulates a public official or public employee from injunctive relief to prevent what would otherwise be an illegal act on his part.

> *Scheuer* states that the immunity doctrine stems from the same considerations that generated the doctrine of sovereign immunity. That immunity is embodied in the eleventh amendment, so that it is significant to note that since *Ex Parte Young*, 209 U.S. 123 [28 S.Ct. 441, 52 L.Ed. 714] (1908), the law has been settled that, notwithstanding the eleventh amendment, in an appropriate case a state official may be enjoined by a federal court from future violation of federal law.
>
> Thus, we conclude that the preliminary injunction is not vulnerable to the claim of official immunity.

*Id.* at 1332.

The reasoning in *Rowley* v. *McMillan* is followed by *Stanford Daily* v. *Zurcher*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978). *See also Jacobson* v. *Tahoe Regional Planning Agcy.*, 566 F.2d 1353 (9th Cir. 1977), *aff'd in part, rev'd in part*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979); *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732, 734 (3d Cir. 1972); *Martin* v. *Wray*, 473 F.Supp. 1131, 1138 (E.D.Wis.1979). For these reasons, any ruling on the equitable requests for reinstatement of the plaintiffs, and the concomitant back pay for the period during which they have been demoted, is not made under the stringent concerns previously discussed.

Both parties understood, previous to trial and afterwards, that the decision for or against ordering reinstatement was peculiarly within the discretion of the trial court.[11] Equitable relief has traditionally been the province of the Court. While

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[11] The facts which gave birth to the claim for equitable relief were adjudicated by the jury. The plaintiffs are wholly incorrect when they state that this aspect of the case was tried by the jury. In fact, the plaintiffs had previously taken the position that had the jury found for the defendants, the district court, nevertheless, could order reinstatment and other relief independent of that verdict. To now make such an inconsistent argument does not advance their case.

the Court indicated a preliminary intention of being guided by the jury's finding, the jury's verdict was merely advisory in this respect, not a mandatory finding that binds the Court. It was always accepted by the parties that the right to trial by jury did not extend to the right of reinstatement. *See Ross* v. *Bernhard*, 396 U.S. 531, 533, 90 S.Ct. 733, 735, 24 L.Ed.2d 729 (1970).

What plaintiffs did succeed in doing at trial was to establish a cause of action under Section 1983, despite the fact that the jury's findings preclude damages against the defendants involved. The proof of a § 1983 action, absent a claim of qualified official immunity requires only two elements: (1) That the defendants acted under color of state law, and (2) that a constitutional right has been denied. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970).

Since there was a violation, "an equity court possesses some discretionary power to award damages in order to do complete justice." *Walter* v. *Marathon Oil*, 7th Cir., 642 F.2d 1098 (1981), citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). In *Albemarle*, a Title VII case, the Court held that back pay should not be withheld without special reason. When a public employee is discharged in violation of his First Amendment or other constitutional rights, he is entitled to reinstatement and back pay. *Eckerd* v. *Indian River School District*, 475 F.Supp. 1350, 1365 (D.Del.1979).

Weighing all of the competing interests in this case, all of the teachers in this consolidated case are ordered to be reinstated and given back pay, pursuant to the terms of the court's order.

This award is made in light of the testimony presented at trial, the verdict of the jury, and the interrogatory answers as interpreted by this Court. In equity, if other remedies are made available to the plaintiffs, this award would of necessity have to be fully reconsidered and evaluated. "[S]ince it is the historic purpose of equity to secure complete justice, the

courts are able to adjust the remedies to as to grant the necessary relief, *Equal Employment Opportunity Commission* v. *General Tel. Co. of Northwest, Inc.*, 599 F.2d 322 (9th Cir. 1979), *aff'd*, [446 U.S. 318] 100 S.Ct. 1698, [64 L.Ed.2d 319] (1980) . . . ," quoted in *Walters* v. *Marathon Oil, supra.* This award is also in accordance with the principles of § 1983 relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

**Civil No. 78-1156**

JOSE ORTIZ RIVERA, *Plaintiff*

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico

and

OSCAR L. RAMOS, individually and as Assistant Secretary of Public Education in Charge of Personnel of the Commonwealth of Puerto Rico,

*Defendants*

**DECISION AND ORDER**

This civil rights action is for a second time before us on Defendants' Motion for Summary Judgment. The facts are essentially outlined in our Decision and Order of November 24, 1979. However, for the sake of clarity and for purposes of analysis of the pending Motion we repeat and add to them below.

Plaintiff is a high school teacher in Orocovis, Puerto Rico. It is a position in which he has tenure. During the 1976-1977 school year he served as Director of Schools in Orocovis. The evidence on record reveals that this appointment was subject to renewal on a year to year basis according to the recommendations of his supervisors and the needs of the Department of Education.[1] On May 27, 1977 Plaintiff, both orally

[1] See Defendants' Motion for Summary Judgment, August 15, 1978, Exh. 3, letter dated August 17, 1976 of Ramon A. Cruz, Secretary of Education, to Plaintiff.

and through a written letter, requested from the Superintendent of Schools for the Orocovis District that he be retransferred to his former position as a social science high school teacher.[2] The present action, however, is premised on the contention that shortly thereafter he changed his mind about returning to his previous position as a teacher and wished to remain in the position of Director. See Plaintiff's Sworn Statement of September 20, 1978.[3] On June 21, 1977[4] he was officially notified that he would not be renewed in his position as Director. The letter so notifying Plaintiff of this fact reads:

"Dear Mr. Ortiz Rivera:

"As you know the appointment to the position you now occupy expires with the termination of the present school year.

"While we appreciate your collaboration we remind you that you are correspondingly reinstated to the position in which you have tenure in the system. To this effect our Personnel Division is proceeding to reinstate you to position number 0129 which is as Secondary School Teacher in the Orocovis District effective at the commencement of the next school year."[5]

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[2] This letter is part of the record before us. See Defendant's Motion for Summary Judgment, August 15, 1978, Exb. 2, letter dated May 27, 1977 from Plaintiff to Mrs. Nelida Melendez de Ortiz. See also Sworn Statement of Plaintiff, Sept. 30, 1978.

[3] There is no documentary evidence to this effect other than Plaintiff's Sworn Statement. The reasons given by Plaintiff for not withdrawing the letter of May 27, 1977 or submitting a new one reflecting his changed feelings is that: (1) he did not believe the letter had any legal effect and (2) he had been informed that the decision not to renew him as a Director had already been made.

[4] This notice is dated June 10, 1977 but stamped as received on June 21, 1977. There is no dispute on this fact.

[5] Our translation. See Decision and Order of November 23, 1978 p. 3. This is Attachment A to the Complaint.

At the commencement of the 1977-1978 school year Plaintiff returned under protest to his previous position as a high school teacher. See Attachment B to the Complaint.

On June 19, 1978 a complaint was filed wherein Plaintiff alleged that Defendant's non-renewal of his contract as a Director was politically motivated in that he was not of the same political affiliation as the Secretary of Education and the higher officials within the Department. Defendants' first Motion for Summary Judgment was premised on the contention that the transfer was legal because Plaintiff had in effect initially requested it and as such their actions were only a response to this voluntary request. While noting that this was a plausible argument on the ultimate merits involved in this litigation we rejected it as falling short of the burden of proof placed on Defendant in this type of request for summary judgment. Where a plaintiff has alleged impermissible reasons for a dismissal or a transfer it is not sufficient on summary judgment that the defendant simply set forth permissible reasons for his actions. In this type of situation the Defendants had the burden not only of showing that a permissible factor could have motivated the transfer-demotion, but that no impermissible factor was involved. See: *Mt. Healthy City School District Board of Education* v. *Doyle*, 427 U.S. 274 (1972); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Mack* v. *Cape Elizabeth School Board*, 553 F.2d 720 (C.A.1, 1977). In the case at bar Defendants' supporting material was substantial with respect to the first part of this burden, but totally lacking with respect to the second part. Our review of the record reveals that it remains lacking on this point to this date.

Defendants' present Motion for Summary Judgment raises for the first time the claim that this cause of action is time barred. This Motion raises identical problems to those present

in *Allende Vazquez* v. *Chardon, et al.*, Civil Number 79-71.[6] Our analysis and decision therein will control much of the controversy present here. However, the different factual circumstances of these two cases requires that we dispose of these two cases separately, and consequently, differently. There is no dispute here as to either the limitations period that controls or the rule which determines when this limitations period accrues. See: *Allende Vazquez* v. *Chardon et. al.*, at pgs. 3, fn. 6;4. In spite of this both parties argue opposite ends as to exactly what date should be fixed as the date of accrual of Plaintiff's cause of action. These opposing views are set out as follows.

Defendants contend that the limitations period commenced to run on May 27, 1977. Defendants' take this date from Plaintiff's own Sworn Statement wherein he relates his conversation with the Superintendent of Schools for the Orocovis District. Said Statement reads in part:

> "That it is true that on or about May 27, 1977, I personally visited Mrs. Nelida Melendez de Ortiz, the Superintendent of Schools at Orocovis School District, and informed her, in writing, that I wished to return to my position of (sic) school teacher at high school level during the 1977-78 school year, position in which I had tenure;
>
> "That on said occasion Mrs. Melendez informed me that my position was not necessary since it had already been determined at the Department's level (sic) that I was going to be removed from the position of school director and was going to be assigned to my permanent position of school teacher;"

Defendants argue that because Plaintiff was orally informed on May 27, 1977 that "it had already been determined [that he]

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[6] Ordinarily we would not cite or use as authority a holding found in an unpublished opinion, cf. Rule 14, Rules of the United States Court of Appeals for the First Circuit. However, no unfairness accrues in the present case since all parties in these related cases are represented by the same counsel.

was going to be removed from the position of school director" and reassigned to his previous position that this then is the date when Plaintiff "knew or had reason to know of his injury."

Plaintiff retorts that the date when his cause of action accrued was in August of 1977,[7] the date when the new school year started and he found himself out of a job as a school director. Under Plaintiff's argument it is at this point when he is in fact demoted and thus has suffered an "actual injury." Under Plaintiff's analysis the possibility or probability that an event might happen in the future is not sufficient to find that a right has been violated and thus to say that the computation of the time limit for the enforcement of that right began to run.

In *Allende Vazquez* v. *Chardon, et al., supra,* we were faced with the question of determining whether an identical cause of action accrued on the date the Plaintiff was officially notified that he was demoted or the date this demotion actually took effect, which was some time later. The factual framework now before us presents a third possibility: the date when Plaintiff was orally and unofficially informed that he would be reassigned. In *Allende Vazquez* we found the date of the official notice of reassignment controlled. The present case evinces no reason which would compel a different conclusion.

The rationale behind our holding in *Allende Vazquez* was, that after receipt of an official notice of reassignment, a Plaintiff who was aware of the impermissible reasons for the official action had a viable cause of action. In such a situation he could both seek and secure relief against the discrimination. However, applying the same reasoning to the case at bar we cannot draw the same conclusion. First, from the informal and unofficial information Plaintiff received in May, 1977 one could not conclude that Plaintiff lost all reasonable expectations that he would continue at his position. Second, and along the same

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[7] No specific date in August is advanced in this record by Plaintiff as the date when classes officially commenced for the 1977-1978 school year.

lines, from the informal conversation one cannot conclude that Plaintiff was in fact demoted or reassigned. Until he was informed officially Plaintiff had no reason to believe that he was demoted. Third, although even the threat of a politically motivated dismissal may have been sufficient to invoke a cause of action, see *Allende Vazquez*, at p. 5, it is unclear from the record before us whether at the May 27, 1977 conversation Plaintiff knew, or should have known, of the illegal motivations behind the decision to return him to his previous position.[8] The very fact that the object of this conversation was Plaintiff's contemplated voluntary return to his previous position is indicative of the contrary.

The above facts persuade us that our analysis in *Allende Vazquez* is equally applicable. The present type of cause of action accrues on the date Plaintiff is officially informed that he is being demoted and he is aware of the reasons for this demotion. It is at this point that there is present a "complete and present cause of action." *Rawlings* v. *Ray*, 314 U.S. 96, 98 (1948). In the present case this occurred on June 21, 1977. Therefore, a complaint filed on June 19, 1978 would be timely.

Lastly, in the file before us we note "Defendants' Opposition to Plaintiff's Motion to Strike Affirmative Defenses," January 31, 1980. We do not, however, find that Plaintiff has herein filed a Motion to Strike affirmative defenses. In any event because these defenses are identical to those reviewed in *Garcia Rosado* v. *Chardon*, Civil Number 79-74, we see no reason why our disposition with this question therein should not control here also.

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[8] Other than Plaintiff's own Sworn Statement, Defendants present no other factual material to substantiate this point. Because this is an issue of fact which is disputed, and indeed on the present record must be resolved against the Defendants, we must bear in mind the limitations of a Motion for Summary Judgment.

For all the above cited reasons Defendants' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 21st day of April, 1980.

/s/ JUAN R. TORRUELLA

JUAN R. TORRUELLA
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

---

**Civil No. 78-1156**

---

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR L. RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

*Defendants.*

**-SWORN STATEMENT OF JOSE RIVERA ORTIZ-**

I, JOSE RIVERA ORTIZ, after being duly sworn according to the law, under oath, depose and say:

That my name is as specified above;

That I am of legal age, married, and a resident of Orocovis, Puerto Rico;

That, at present, I work as secondary school teacher at the high school of the school district of Orocovis;

That I am plaintiff in the above captioned class action;

That I was demoted or removed from the position of Secondary School Director, Category IV, on June 10, 1977 to Secondary School Teacher, effective said demotion on the beginning of the 1977-78 school year, as per letter dated on said date, signed by Mr. Julio Cintron Lopez, Director of Teacher's Personnel Division of the Department of Education of Puerto Rico.

That it is true that on or about May 27, 1977 I personally visited Mrs. Nelida Melendez de Ortiz, then Superintendent of

School at Orocovis School District, and informed her, in writing, that I wished to return to my position of school teacher at high school level during the 1977-78 school year, position in which I had tenure;

That, on said occasion Mrs. Melendez informed me that my petition was not necessary since it had already been determined at the Department's level that I was going to be removed from the position of School Director and was going to be assigned to my permanent position of school teacher;

That Mrs. Melendez did not receive my letter officially; did not file it nor put it in any part of the office where it could be filed later, but instead took the letter and placed and kept it on her purse;

That she didn't answer my letter, officially or otherwise;

That nobody else in the Department of Education answered my letter, officially or otherwise;

That the only letter I received in relation with this matter was the one dated June 10, 1977, in which, as it had been advanced by Mrs. Melendez, I was informed that I had been reinstalled to occupy position 0129 in the district of Orocovis as Secondary School Teacher.

That on June 30, 1977 I decided to take my case to the U.S. District Court since I then believed and still believe that my rights under the pertinent constitutional and legal provisions had been violated;

That I didn't withdraw my letter since I was told by Mrs. Melendez that said letter had no effect whatsoever, and, simultaneously she placed it in her purse;

That it is not true that I asked Mrs. Melendez, verbally, to be relocated to another school other than the one I had directed.

Given at San Juan, Puerto Rico, this 30th day of September, 1978.

/s/ *Jose Ortiz Rivera*
JOSE ORTIZ RIVERA
Deponet

Affidavit NO. *2101*

Sworn and subscribed to before me by MR. JOSE ORTIZ RIVERA, of legal age, married, and a resident of Orocovis, Puerto Rico, to me personally known in San Juan, Puerto Rico, this 30th day of September, 1978.

/s/ *Harry R. Nadal Arcelay*
HARRY R. NADAL ARCELAY
Notary Public

Office-Supreme Court, U.S.
FILED
DEC 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-271

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

**On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## JOINT APPENDIX

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**Petition for Writ of Certiorari Filed August 16, 1982**
**Writ of Certiorari Granted November 8, 1982**

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IN THE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

No. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, ETC., *et al.*, *Defendants*.

# DOCKET ENTRIES

| Document | Date |
|---|---|
| Complaint, Asserting A Class Action | filed June 19, 1978 |
| Minutes Of Proceeding In Chambers Of District Judge Torruella, Denying Plaintiff's Motion For Class Certification | entered August 21, 1978 |
| Plaintiff's Motion For Reconsideration Of Ruling Denying Class Certification | filed September 11, 1978 |
| Answer To The Complaint | filed September 28, 1978 |
| Plaintiff's Motion For Leave To File Amended Complaint And Attaching Proposed Amended Complaint | filed October 5, 1978 |
| Decision And Order Of District Judge Torruella, Denying Plaintiff's Motion For Leave To File Amended Complaint | entered November 24, 1978 |
| Plaintiff's Motion For Reconsideration Of Ruling Denying Leave To File Amended Complaint | filed November 29, 1978 |

| Document | Date |
|---|---|
| Complaint Of Carmen Nunez Rivera (79-66) | filed January 10, 1979 |
| Complaint Of Carmen L. Negron Marin (79-70) | filed January 10, 1979 |
| Complaint Of Carmen H. Montes Velez (79-73) | filed January 10, 1979 |
| Complaint Of Carmen Garcia Rosada (79-74) | filed January 10, 1979 |
| Complaint Of Noelia Torres de Cantres (79-76) | filed January 10, 1979 |
| Complaint Of Antonio Rodriguez Rivera (79-83) | filed January 10, 1979 |
| Complaint Of Ramon Norat Zayas (79-219) | filed January 12, 1979 |
| Complaint Of Jose E. Aponte de la Torre (79-164) | filed January 15, 1979 |
| Complaint Of Nilsa Cardona Flores (79-169) | filed January 15, 1979 |
| Complaint Of Elba M. Colon Torres (79-176) | filed January 15, 1979 |
| Complaint Of Aurora Sierra Pizarro (79-183) | filed January 15, 1979 |
| Complaint Of Virginia Otero Arroyo (79-185) | filed January 15, 1979 |
| Complaint Of Ana Mercedes Ortiz Colon (79-197) | filed January 15, 1979 |
| Complaint Of Juan Fumero Soto (79-198) | filed January 15, 1979 |
| Complaint Of Dora Castro de Aguilar (79-199) | filed January 15, 1979 |
| Complaint Of Sylvia M. Denis (79-209) | filed January 15, 1979 |
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| Document | Date |
|---|---|
| Complaint Of Elba Rosario de Bravo (79-213) | filed January 15, 1979 |
| Complaint Of Charles H. Quiles Mariana (79-220) | filed January 15, 1979 |
| Complaint Of Reinaldo Rodriguez Solivan (79-206) | filed January 19, 1979 |
| Complaint Of Aida Rodriguez Rioz (79-72) | filed January 24, 1979 |
| Complaint Of Santiago Gonzalez Velasquez (79-323) | filed January 26, 1979 |
| Complaint Of Bienvenido Rivera Diaz (79-325) | filed January 26, 1979 |
| Complaint Of Carmen M. Morales Hernandez (79-326) | filed January 26, 1979 |
| Complaint Of Juan Rivera Pagan (79-329) | filed January 26, 1979 |
| Complaint Of Angela Colon Santiago (79-330) | filed January 26, 1979 |
| Complaint Of Joaquin Cruz Mendez (79-332) | filed January 26, 1979 |
| Complaint Of Ursula Aguilar Quintero (79-333) | filed January 26, 1979 |
| Complaint Of Aminta Rivera Cardona (79-334) | filed January 26, 1979 |
| Complaint Of Nelson Velez Quinones (79-336) | filed January 26, 1979 |
| Complaint Of Cristina Cancel Cuevas (79-357) | filed January 31, 1979 |
| Complaint Of Maria D. Guerra Navarro (79-358) | filed January 31, 1979 |
| Complaint Of Francisco Bonilla Ocasio (79-361) | filed January 31, 1979 |
| Complaint Of Heriberto Gallardo Gutierrez (79-362) | filed January 31, 1979 |

| Document | Date |
|---|---|
| Complaint Of Julio E. Colon (79-364) | filed January 31, 1979 |
| *Answer To The Complaint In *Fumero Soto* v. *Chardon* | filed March 26, 1979 |
| Order And Memorandum Of District Judge Grant, Denying Defendants' Motion For Judgment Notwithstanding The Verdict | entered May 7, 1981 |
| Final Order And Judgment Of District Judge Grant | entered July 24, 1981 |
| Defendants' Notice Of Appeal To United States Court Of Appeals For The First Circuit | filed July 30, 1981 |
| Judgment Entered By Clerk Of The District Court In Accordance With The Final Order And Judgment Of District Judge Grant | entered July 31, 1981 |
| Plaintiffs' Notice Of Cross-Appeals To The United States Court Of Appeals For The First Circuit | filed August 12, 1981 |
| Consent Judgment Order Of District Judge Grant, Entered *Nunc Pro Tunc* To Final Order And Judgment Of July 24, 1981 | entered January 7, 1982 |

*A similar Answer was filed in each individual case during this approximate time period.

IN THE

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO**

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**Nos. 81-1567, 81-1607**

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JUAN FUMERO SOTO, *et al.*, *Plaintiffs*,

v.

CARLOS CHARDON, ETC., *et al.*, *Defendants*.

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# DOCKET ENTRIES

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| Document | Date |
|---|---|
| Opinion And Order Of The United States Court Of Appeals For The First Circuit | entered June 8, 1982 |
| Judgment Of The United States Court Of Appeals For The First Circuit | entered June 8, 1982 |
| Order Of The United States Court Of Appeals For The First Circuit, Granting Plaintiffs' Petition For Reconsideration And Modification Of Judgment | entered July 6, 1982 |
| Order Of The United States Court Of Appeals For The First Circuit, Denying Defendants' Petition For Rehearing | entered July 6, 1982 |

| Document | Date |
| --- | --- |
| Order Of The United States Court Of Appeals For The First Circuit, Denying Defendants' Petition For Rehearing On Modification Of Judgment And Granting Conditional Stay Of Mandate Pending Application To The Supreme Court Of The United States For A Writ Of Certiorari | entered July 28, 1982 |

IN THE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

**CIVIL ACTION NO. 78-1156**
**TRIAL BY JURY**

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

*Defendants.*

## COMPLAINT

TO THE HONORABLE COURT:

NOW COMES the Plaintiff and through his undersigned attorneys very respectfully claims, alleges, and requests as follows:

1. This is a class action for declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. § 1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. § 249(e), and 18 L.P.R.A. 214, *et seq.*

2. The jurisdiction of this Court is founded upon 28 U.S.C. § 1331 and 1343(3) and (4). The amount in controversy exceeds $10,000.00, exclusive of interests and costs.

3. The Plaintiff in this action, which is an action pursuant to Rule 23(a) and 23(b) (1) and (2) of the Federal Rules of Civil Procedures, is Jose Ortiz Rivera, who is a resident of Puerto Rico and an employee of the Department of Public Education of the Commonwealth of Puerto Rico (referred to hereinafter as "the Department"). Jose Ortiz Rivera brings this action on behalf of himself and the members of the class described in paragraph 20 of this complaint.

4. The Defendants in this action are:

(a) Carlos Chardon, who is, and at all times herein relevant was, the Secretary of Public Education of Puerto Rico. In this capacity, he has ultimate responsibility for the supervision and administration of the Department, including determination of the employment status of the Plaintiff and those in his class. Defendant Chardon is sued in his individual and official capacities.

(b) Oscar Ramos, who is, and at all times herein relevant was, the Assistant Secretary of Public Education in Charge of Personnel of Puerto Rico. In this capacity, he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the plaintiff and those in his class. Defendant Ramos is sued in his individual and official capacities.

5. On November 2, 1976, Puerto Rico held a gubernatorial election. In this election, the candidate of the Popular Democratic Party (referred to hereinafter as the "PDP") was incumbent Governor Rafael Hernandez Colon. Former Governor Hernandez Colon was defeated by Governor Carlos Romero Barcelo, who was the candidate of the New Progressive Party (referred to hereinafter as the "NPP"). Governor Romero Barcelo took office on January 2, 1977.

6. Governor Romero Barcelo appointed Mr. Herman Sulsona as Secretary of Public Education, and Sulsona, in turn, appointed defendant Ramos as Assistant Secretary of Public Education in Charge of Personnel. Both Sulsona and Defend-

ant Ramos assumed their positions on or about January 3, 1977. Both Sulsona and Defendant Ramos are members and active in the affairs of the NPP.

7. On or about March 13, 1977, Mr. Sulsona resigned as Secretary of Public Education, and Governor Romero Barcelo appointed Defendant Chardon as his successor. Defendant Chardon assumed the position of Secretary of Public Education on or about March 31, 1977. Defendant Chardon is a member and active in the affairs of the NPP.

8. Ortiz Rivera was employed during the 1976-77 school year in a Director position by the Department. To this position he had been promoted on the basis of his merits, from a position in which he did have and enjoy permanent status within the meaning of 18 L.P.R.A. 211 and protected by 18 L.P.R.A. 214, *et seq*. Ortiz Rivera was demoted to his previous position. This last action on the part of Defendants also deprived Ortiz Rivera of his constitutional rights and in particular constituted a violation of his rights under the First and Fourteenth Amendments of the Constitution of the United States. The Director position in which Ortiz Rivera was employed during the 1976-77 school year involved functions of school administration. It was not a policy-making position, and Ortiz Rivera did not participate in the formulation of policies relating to the operation of the Department. He had to follow policies formulated at the Department's level.

9. Ortiz Rivera is, and at all times herein relevant was, a member and active in the affairs of the PDP. On information and belief, the defendants are, and at all times herein relevant were, aware of Ortiz Rivera's political association with the PDP, even if they did not know him personally.

10. On or about June 21, 1977, Ortiz Rivera received a letter, dated June 10, 1977, from Julio Cintron Lopez, Director of the Personnel Division of the Department, removing him from his Director position, effective at the beginning of the 1977-78 school year, and reassigning him to his previous position in the Department. A copy of the aforesaid letter is

attached to this complaint as *Attachment A*, and made a part hereof. Ortiz Rivera's permanent position is a classroom teacher position, which is lower in rank and compensation than a Director position, and, therefore, his reassignment constitutes a demotion. On June 30, 1977 Plaintiff wrote a letter to Defendant Chardon, in which he objects his removal from his position as Director and announces that he is taking the necessary steps towards the corresponding legal action. A copy of such letter is attached to this complaint as *Attachment B*, and made a part hereof.

11. The June 10 letter sets forth no reason for Ortiz Rivera's removal from his Director position, and there was no legitimate reason for such removal. No notice, hearing, nor any other form of due process was awarded in his case.

12. At the beginning of the 1977-78 school year, Ortiz Rivera was actually removed from the Director position in which he was employed during the 1976-77 school year, and demoted to his permanent position in the Department. As of the date of this complaint, he is serving in the latter position.

13. Substantially all of the persons who were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians and who were members and/or active in the affairs of the PDP or political parties other than the NPP were removed from their positions at the end of the 1976-77 school year or the beginning of the 1977-78 school year; and substantially all of the persons who were employed during the 1976-77 school year without permanent status in the aforesaid positions and who were not members and/or active in the affairs of the PDP or political parties other than the NPP were not removed.

14. The Director position in which Ortiz Rivera was employed during the 1976-77 school year has been filled for the 1977-78 school year.

15. Ortiz Rivera alleges that the defendants removed him from his Director position at the beginning of the 1977-78 school year and demoted him to his previous position solely because of his political association with the PDP, and that he would not have been removed and demoted but for such association.

16. Ortiz Rivera alleges that the aforesaid action by the Defendants constitutes a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. He also alleges that said action is contrary to and contravenes the rights acquired by him under the provisions of 18 L.P.R.A. 214, *et seq.* He further avers that as a career public servant (empleado publico de carrera) he had the legitimate expectation to remain in the position to which he had been promoted (and from which he was demoted by Defendants) and that he could not be removed or demoted from that position except for cause.

17. The defendants knew, or reasonably should have known, that removing Ortiz Rivera from his Director position and demoting him to his previous position because of his political association with the PDP, was a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. The defendants acted maliciously, willfully, and in wanton and reckless disregard of Ortiz Rivera's constitutional rights when they took the aforesaid action, all in violation of Plaintiff's civil rights as provided in Section 1983, 42 U.S.C.A.

18. The action of the Defendants in removing Ortiz Rivera as stated above constituted a violation of Ortiz Rivera's rights under the First and Fourteenth Amendments to the United States Constitution; constituted a violation of his civil rights as provided in Section 1983, 42 U.S.C.A., and constituted a violation of his rights under the laws of Puerto Rico, specifically (in addition to § 214 mentioned in paragraph 16), under Section 249(a) and (e), of Title 18, L.P.R.A.

Section 249(a) of 18 L.P.R.A. provides as follows:

> "By public school teachers shall be understood, for the purposes of sections 249a-249e of this title, teaching personnel, which includes both the teachers in charge of teaching and special services directly connected with the teaching work, and the officers or employees in technical tasks or in school supervision and administration . . ."

Section 249(e) of 18 L.P.R.A. provides as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status."

19. Ortiz Rivera invokes the pendent jurisdiction of the Court to hear and decide his claim based upon the above-quoted provisions of Puerto Rico law, and Sections 214, *et seq.* of 18 L.P.R.A.

20. Ortiz Rivera brings this class action on his own behalf and, pursuant to Fed. R. Civ. P. 23(a) (1) and (2), on behalf of all other persons who:

(a) were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions within the Department, pursuant to the definition contained on 249(a) Title 18, L.P.R.A.;

(b) were removed from their positions at the beginning of the 1977-78 school year; and

(c) were members and/or active in the affairs of the PDP or political parties other than the NPP, this being the reason for their removal.

The above-described persons are referred to hereinafter as the Class.

21. The members of the Class reside and work throughout Puerto Rico, and are so numerous, in all probability in excess of one hundred, that it would be impracticable, within the meaning of Fed. R. Civ. P. 23(a) (1), to join all of them in this action.

22. All of the members of the Class, like Ortiz Rivera, were removed from their administrator positions or from the positions enumerated in paragraph 13, solely because of their political association with the PDP or political parties other than the NPP. Accordingly, there are questions of law or fact common to the Class within the meaning of Fed. R. Civ. P. 23(a) (2).

23. Ortiz Rivera's causes of action are based on the claim that the defendants discriminated against him because of his political association with the PDP. This claim is typical of the claims of the members of the Class within the meaning of Fed. R. Civ. P. 23(a) (3).

24. Since Ortiz Rivera's causes of action and the relief which he seeks necessarily would be appropriate for all of the members of the Class, he fairly and adequately will protect the interests of the Class within the meaning of Fed. R. Civ. P. 23(a) (4).

WHEREFORE, the Plaintiff respectfully requests from this Court that it:

1. Declare that the Defendants:

   (a) in removing the Plaintiff and the members of the Class which he represents from the positions in which they were employed during the 1976-77 school year, violated their rights under the First and Fourteenth Amendments to the United States Constitution and under Section 1983 of 42 U.S.C.A.; and also violated their rights under Sections 249(a) and (e) and 214 of Title 18 L.P.R.A.

2. Order that the Defendants:

   (a) reinstate the Plaintiff and the Members of the Class which he represents to the positions in which they

were employed during the 1976-77 school year and from which they were dismissed or demoted in violation of their rights under the statutes mentioned in the complaint.

(b) pay to the Plaintiff and the members of the Class which he represents full back pay for the period from the date of their removal or demotion from the positions in which they were employed during the 1976-77 school year until the date of their reinstatement to those or other substantially equivalent positions, including prejudgment interests, less any pay received, by them from the Department during the period in question.

(c) pay to the Plaintiff and the members of the Class, all damages proximately resulting from defendants' wrongful actions;

(d) pay to the Plaintiff and the members of the Class punitive damages in the amount of $2,500,000.00; and

(e) be enjoined pendente lite and permanently from removing any person from a non-policy making position with the Department because of such person's political association.

3. Award to the Plaintiff and the Class he represents:

(a) costs and reasonable attorneys' fees; and

(b) such other and further relief as this Court shall find to be just and proper.

RESPECTFULLY SUBMITTED. In San Juan, Puerto Rico, this 16th day of June, 1978.

HIRAM R. CANCIO
HARRY R. NADAL ARCELAY
(CANCIO, NADAL & RIVERA)
G.P.O. Box 4966, San Juan, P.R. 00936

LUIS MIRANDA CORREA
Of. 505 - Edif. Asoc. Maestros, Hato Rey, P.R.

LUIS MUNOZ RIVERA
Cond. El Centro I - Of. 607, Hato Rey, P.R.

LUIS E. GANDIA ARGUELLES
Box 20343, Rio Piedras, P.R. 00928

By HIRAM R. CANCIO
HIRAM R. CANCIO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MINUTES OF PROCEEDINGS - DATE: August 21, 1972

BEFORE:

JUDGE
___ Toledo
___ Pesquera
_X_ Torruella
___ Other _____
___ Magistrate Pérez
___ Magistrate Simonpietri

COURT REPORTER
___ Vazquez-Tellas
___ Pineda
_X_ Caro
___ Other _____

COURTROOM DEPUTY
___ V. Maldonado
_X_ L. Rivera
___ Other _____

Interpreter _____

José Ortiz Lucas _____ Civil No. 72-1156

_____ Cr. No. _____

Plaintiff

vs.

Carlos Lamas, Etc et al

Defendant

Attorneys:

For Plaintiff Efrain Cancio
& Harry Nadal

For Defendant Emmanuel Agrait

Case called for hearing on pend motion to modify OSC
& on pltff's request for a stipulation of class action.
Counsel of counsel heard on request for stipulation
of class action. Motion heard. Counsel for pltff
request ext of time to file and to amend complaint
Ct to grant motion to modify OSC, counsel heard
Ct which Ct states that Order will be amended
to the effect that hearing on 9/6/72 will be only
a preliminary inquisition & that thereafter a
hearing will be set for another date on amend
inquisition. Counsel instructed to meet & file stipulation
by Friday

L. Rivera
Courtroom Deputy (Initials)

**[Transcript of Minutes of Proceedings]**

Case called for hearing on joint motion to modify O.S.C. [Order To Show Cause] & on plaintiff's request for a certification of class action. Argument of counsel heard on request for certification of class action. Motion denied. Counsel for plaintiffs request extension of time to file mot. to amend complaint. As to joint motion to modify O.S.C., argument heard after which Court states that Order will be amended to the effect that hearing on 12/6/78 will be only on preliminary injunction & that thereafter a hearing will be set for another date on permanent injunction. Counsel instructed to meet and file timetable by Friday.

L. Rivera

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of The Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of The Commonwealth of Puerto Rico,

*Defendants.*

**MOTION FOR RECONSIDERATION OF RULING**

TO THE HONORABLE COURT:

COMES NOW the Plaintiff, and through his undersigned attorney, very respectfully requests from this Court the following:

1. A complaint was filed before this Court on the 16th day of June, 1978, pursuant to Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure as a class action seeking declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. § 1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. § 249(e), and 18 L.P.R.A. 214, *et seq.*

2. That on August 10th, 1978 this Honorable Court entered an Order directing the parties to argue Plaintiff's request for certification of a class action under Rule 23(c) of the Federal Rules of Civil Procedure.

3. That a hearing was held on Monday, August 21, 1978, in which this Court held that the complaint, as filed, did not comply with the requirements of Rule 23 (a)(1) of the Federal Rules of Civil Procedure and that, therefore, this was not a class action.

4. We respectfully urge this Honorable Court to reconsider its ruling and to certify that the complaint at bar is a class action pursuant to the provisions contained in Rule 23 in support of which we submit:

## I

### Statement of Facts

On June 16th, 1978 the Plaintiff filed an action on behalf of individuals who were employed by the Department of Education of the Commonwealth of Puerto Rico during the 1976-77 school year without permanent status in locally and/or federally funded positions within said Department; and who were removed from said positions at the beginning of the 1977-78 school year and who were members and/or active in the affairs of a political party other than the N.P.P., this being the prime reason for their removal.

The complaint alleges that this is a class action pursuant to Rule 23(a) (1) and (2), since the members of the class are residents and working throughout Puerto Rico; that they are so numerous that it will be impracticable, within the meaning of Federal Rules of Civil Procedure 23(a)(1), to join all of them in this action.

Allegations 22, 23, and 24 of the complaint filed are intended to, and do comply with the requirements of Rule 23(a) (2), 23(a)(3), and 23(a)(4).

This Court, after hearing argument, on August 21, 1978, held that the complaint, as filed, did not comply with the requirement contained in Rule 23(a) (1), and that, therefore, this action could not be certified as a class action pursuant to Rule 23(c).

**Rule 23(a) (1)**

The beforementioned Rule states, inasmuch as pertinent to the ruling of this Court, that:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) *the class is so numerous that joinder of all members is impracticable.*"

This court held that it had not been established that a joinder of all members of the class represented in the complaint was impracticable. The Court emphasized the fact that although the plaintiffs may will be numerically great, the Court did not find any impracticability in that each of them join in an action discarding the mechanism provided by Rule 23. The Court in its ruling also indicated that joinder was not impracticable due to the fact that all the plaintiffs resided in Puerto Rico and the geographical extension of the Island provided access to each of the plaintiffs and that the determination of whether or not to certify a class action would rest upon this fact.

Rule 23(a) (1) must be liberally construed since the prime reason for the existance of the class suit doctrine is basically procedural necessity, which in turn necessarily hinges upon the question of number; in other words, the question of what constitutes "*impracticability of joinder*" boils down to a determination of when is a class so numerous as to make it impracticable to bring them all before the Court. *Carrole* v. *Associated Musicias of Gratern New York*, 206 F. Supp. 462 (1962); *Cutter* v. *American Federation of Musicians*, 211 F. Supp., 433 (1962). We find that there are a great number of state decisions, as well as federal decisions under Rule 23(a), which somewhat reflect the contrariety of opinion existing as to the meaning of *numerous*. For example, we find that it has been held that numerosity as a requirement under Rule 23 was satisfied when the persons constituting a class were so numerous as to make it impracticable to bring them all before the Court. This holding developed into the present Rule 23(a)(1), which, in dealing with numerosity, defines it in terms of whether or not the joinder of all members of the class is

impracticable because of their number. There is no hard or determined strict Rule regarding number since the concept of numerosity is tied in a definite manner to impracticability of joinder under very specific circumstances.

Although, as we have stated, there is no specific rule which will be applicable to each case before this Court, there are some general tendencies which habe been established and can be utilized in order to descipher the general parameters of the numerosity doctrine and of the requirement contained in Rule 23(a)(1). We find that numbers of individuals under 21 have generally been held to be too few while numbers between 21 and 40 have evoked mixed reactions from different courts. Furthermore, while we admit that there are exceptions to each rule, it seems that numbers in excess of 40, *and particularly those exceeding 100* or 1,000 *have sustained the determination that joinder is impracticable. Gay* v. *Waiters and Dairy Lunchmen's Union* (CA9th, 1977) 549 F2d 1330; *Albertson's, Inc.* v. *Amalgamated Sugar Co.* (D Utah 1973) 62 FRD, 43; *Beckerman* v. *Sands* (SD New York 1973) 364 F Supp 1197; *Henning* v. *United States* (ND III 1974) 385 F Supp 1138; *Larionoff* v. *United States* (D DC 1973) 365 F Supp 140; *Gonzalez* v. *Sheely* (D Ariz 1951) 96 F Supp 1004.

It has also been held that neither the multiplicity of parties, nor the inexperiency, nor the inconvenience of bringing parties before the Court will, in themselves, justify the class action. But these are, however, matters which evidence impracticability. It has been held that under Rule 23(a) (1) the one who asserts the class must show that the circumstances surrounding the case makes the joinder of all the parties impracticable as established in Rule 23(a) (1). The elements which the one who asserts the class should establish concern the sustantive nature of the claim, the type of classsuit, and the relief requested in the complaint, since these elements determine how expansive a definition of the class will be allowed and, therefore, will also determine the numerosity of a class in relation to the impracticability of joinder. It is clear that impracticability of joinder does not mean impossibility, since it is sufficient to

show that it is extremely difficult or inconvenient to join all members of the class. (*Pacific Fire Insurance Company* v. *Reiner*, 45 F. Supp. 703 (1942).

In point to the case before this Court is the holding that Rule 23 of Civil Procedure should be given a liberal rather than a restrictive interpretation. It has consistently been held that:

> "To dismiss a class suit in its incipiency before claimants have been given an effective opportunity to join would be a disservice to the class action as envisioned in the new rule. Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation. *Escott* v. *Barchris Construction Corp.*, 340 F.2d 731, 733 (2d Cir. 1965), cert. denied 382 U.S. 816, 86 S.Ct. 37, 15 L.Ed.2d 63 (1966), and that the dismissal *in limine of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself.*"

As stated during our original argument in support of class certification, this Court has before it a complaint which pretends to establish common causes of action under various Puerto Rican Statutes, as well as under the Federal Law for a number of "teachers", all of which meet the characteristics established in allegation 20 through 24 of said complaint. The members of the class, as alleged in paragraph 21 of the complaint are numerous. This numerosity being well in excess of 100 individuals. By denying class certification under Rule 23(c), this Court is fostering the filing of over a 100 similar or identical complaints. Thus, it seems it will be achieving exactly what Rule 23 tried to prevent when it is considered essentially a procedural mechanism for the expediency of judicial procedure. The plaintiffs are all teachers, and it would be unduly burdensome for them to institute a complaint for each individual. The effect that this would have on the calendar of the Court is readily apparent. The plaintiffs, as stated before, well exceed the 100 figure and besides the excessive duplication of pleadings, this will greatly affect the expediency within which this common matter can be brought before the Court for final adjudication, since joinder will definitely be impracticable

when one is confronted with this very large number of plaintiffs.

Lastly, let us think for a moment of one aspect of the situation of the case at bar. One of the conditions of the class, as the Court knows, is that its members were demoted allegedly because they did not belong to the New Progressive Party. Even though we do not have a record of the proceedings of the hearing held by this Hon. Court regarding the issue of impracticability of joinder; it seems quite clear to us that the Court feels that it is not impracticable to join those members of the class who are not already our clients. The Hon. Judge's reasoning, as expressed in open Court, seems to be that *all* the members of the class are employees of the same Department of the Government; that there is a Personnel Division or unit where the names of all of them can be located; that such names, addresses, and other pertinent data for us to use in an effort to join them are at our disposal; and that these and other facilities will help us in joining all parties.

This reasoning is logical but, we respectfully submit, it leads the Court to error because it does not contain important aspects necessary; indispensable, rather; for any one to reasonably determine who belongs to the class and who does not. The Personnel Unit of the Department undoubtedly must have the names of all those persons who were employed in the Department, in a supervisory capacity last school year; with an effort, it can provide us with a list of those who, not being permanent, were demoted; but it certainly cannot, from their records or otherwise, give us information to decide which of them were demoted for the reasons alleged in the complaint. Without this last information, it is not only impracticable, but impossible to join all members of the class and, if the Court's ruling were to prevail, those who have not come to us would be greatly prejudiced in their rights.

We respectfully submit to this Honorable Court that it reconsider its ruling of August 21 of 1978 and hold that the complaint as filed is a class action pursuant to Rule 23 and that

it meets the requirements of subsection (a) (1) of numerosity, and, furthermore, that it issue a certification of a class action under Rule 23(c).

In San Juan, Puerto Rico, respectfully submitted, this 7th day of September, 1978.

CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, Puerto Rico 00936

/s/By HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

**PROOF OF SERVICE**

I hereby certify that on this same date a copy of the foregoing Motion for Reconsideration of Ruling has been sent to: Francisco R. Agrait Llado, Attorney for Defendants, Department of Justice, P.O. Box 192, San Juan, P.R. 00902; Luis Miranda Correa, Esq., Of. 505, Edif. Asociacion de Maestros de P.R., Hato Rey, P.R.; to Luis Munoz Rivera, Esq., Cond. El Centro 1, Of. 607, Hato Rey, P.R. and to Luis E. Gandia Arguelles, Esq., Box 20343, Rio Piedras, P.R. 00928.

/s/ HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

**RECEIVED & FILED**
**SEPTEMBER 29 8:45 AM '78**
**CLERK'S OFFICE**
**U.S. DISTRICT COURT**
**SAN JUAN, P.R.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

*Defendants.*

## ANSWER TO THE COMPLAINT

TO THE HONORABLE COURT:

Appearing through their undersigned attorneys and without submitting to the jurisdiction of this Honorable Court, defendants Carlos Chardon, Secretary of Education of the Commonwealth of Puerto Rico, and Oscar Ramos, Assistant Secretary In Charge of Personnel of the Department of Education of the Commonwealth of Puerto Rico, submit the following answer to the complaint:

### GENERAL ALLEGATIONS

1. The Complaint fails to state a claim against these appearing parties upon which any relief may be granted by this Honorable Court.

2. All conclusions of law alleged in the Complaint are disputed insofar as applicable to the factual allegations therein.

3. All factual allegations contained in the Complaint, except those specifically admitted below and as therein qualified, are denied.

4. All allegations referring to plaintiff's alleged Class are generally denied for this Honorable Court denied plaintiff's Class Certification on August 21, 1978.

**SPECIFIC ALLEGATIONS**

5. Defendants admit paragraphs 4a and b with the clarification that Mr. Ramos' official title is Assistant Secretary of Public Education in Charge of Personnel; 5; 14.

6. Defendants admit the following paragraphs of the Complaint in part, and accept them in part:

*Paragraph 3*—Defendants admit that Mr. Jose Ortiz Rivera is an employee of the Department of Education of the Commonwealth of Puerto Rico, the rest of the pargraph is denied.

*Paragraph 6*—The first two sentences are admitted, the last sentence is denied.

*Paragraph 7*—It is admitted, except for the last sentence which is denied; Mr. Carlos Chardon is but a member of Governor Romero Barcelo's cabinet, the Secretary of Public Education.

*Paragraph 8*—It is admitted that Mr. Jose Ortiz Rivera was employed during the 1976-77 school year in a Director position, from a permanent position. It is also admitted that he performed the duties inherent to his position as Director. The rest of the allegations contained in this paragraph are denied.

*Paragraph 10*—It is admitted that Mr. Julio Cintron Lopez sent a letter to Mr. Ortiz Rivera reinstating him to his permanent position as a Social Studies High School Teacher. It is also admitted that on June 30, 1977, Plaintiff wrote a letter to defendant Secretary Chardon, expressing his objection as to the decision announced to him in Mr. Cintron Lopez's letter to him. The rest of the allegations contained in this paragraph are denied.

*Paragraph 12*—Denied as stated in the Complaint. At the beginning of the school year 1977-78, Mr. Ortiz Rivera was reinstated to his permanent position as a Social Science High School Teacher in the Orocovis School District, a position in which he is presently serving.

7. Paragraph 9 is Denied For Lack of Information and Belief.

8. The following paragraphs are Denied: 1, 2, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24.

**AFFIRMATIVE DEFENSES**

1. The Complaint fails to state facts upon which any relief can be granted by this Honorable Court.

2. The Complaint fails to state a case or controversy cognizable by this Honorable Court.

3. The Complaint fails to state specific facts adequate to support the jurisdictional grounds alleged therein.

Wherefore these appearing defendants respectfully pray from this Honorable Court, the Complaint herein be dismissed, taking plaintiff with defendants costs, expenses and attorney's fees and such other relief as this Honorable Court may deem just and proper.

Respectfully Submitted.

In San Juan, Puerto Rico, this 28th day of September, 1978.

I hereby certify that copy of this Answer to the Complaint has been sent to Harry R. Nadal Arcelay, Esq., Cancio, Nadal & Rivera, G.P.O. Box 4966, San Juan, Puerto Rico 00936; Luis Miranda Correa, Esq., Of. 505, Asociacion de Maestros Building, Hato Rey, Puerto Rico; Luis Munoz Rivera, Esq., Cond. El Centro 1, Of. 607, Hato Rey, Puerto Rico and to Luis E. Gandia Arguelles, Esq., Box 20343, Rio Piedras, Puerto Rico 00928.

In San Juan, Puerto Rico, this 28th day of September, 1978.

MIGUEL A. GIMENEZ MUNOZ
Secretary of Justice

CARLOS A. SHINE
Deputy Secretary of Justice

/s/ FRANCISCO R. AGRAIT LLADO
Francisco R. Agrait Llado
Attorney
Department of Justice
P.O. Box 192
San Juan, Puerto Rico 00902
Tel. 723-8019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of The Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of The Commonwealth of Puerto Rico,

*Defendants.*

**MOTION UNDER RULE 15 FRCP REQUESTING LEAVE OF COURT TO AMEND COMPLAINT**

TO THE HONORABLE COURT:

NOW COMES the Plaintiff and through his undersigned attorneys very respectfully alleges and requests:

1. That a complaint was filed on June 16, 1978, pursuant to Rule 23(a) of the Rules of Civil Procedure, alleging that the Plaintiff, together with more than a hundred (100) other persons who were found in a similar situation as described in paragraph eight (8) of the complaint, comprised a class which meets the requirements of said Rule 23.

2. That this Honorable Court held from the bench on August 21, 1978 that said individuals could not be certified as a class because they did not comply with one of the requirements of Rule 23.

3. That on September 7th, 1978, Plaintiff filed a "Motion for Reconsideration of Ruling", expressing and arguing why the class should be certified as previously prayed for.

4. That on September 28, 1978 this Honorable Court denied the aforesaid Motion, which denial was notified to Plaintiff on October 2, 1978.

5. That on account of the rulings of the Court the best alternative left to the individual members of the class is to have the complaint amended in such a manner that each of them becomes a Co-Plaintiff.

6. That on this date Plaintiffs are submitting an amended complaint, including as Co-Plaintiffs those members of the class who have requested to be represented by the undersigned attorneys in this case.

NOW WHEREFORE, it is respectfully requested from this Honorable Court that it permit Plaintiff to file the attached Amended Complaint and enter the necessary order to that effect.

In San Juan, Puerto Rico, this 2nd. day of October, 1978.

CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, P.R. 00936

/s/ By HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

**PROOF OF SERVICE**

I hereby certify that on this same date a copy of the foregoing Motion Under Rule 15 FRCP Requesting Leave of Court to Amend Complaint was sent to: Francisco R. Agrait Llado, Attorney for Defendants, Department of Justice, P.O. Box 192, San Juan, P.R. 00902; Luis Miranda Correa, Esq., Of. 505, Edif. Asociacion de Maestros de P.R., Hato Rey, P.R.; to Luis Munoz Rivera, Esq., Cond. El Centro 1, Of. 607, Hato Rey, P.R., and to Luis E. Gandia Arguelles, Esq., Box 20343, Rio Piedras, P.R. 00928.

/s/ HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO**

## CIVIL ACTION 78-1156

## TRIAL BY JURY

ANGEL L. ARZON MENDEZ, CARLOS CRUZ BELTRAN, AIDA A. LOPEZ DE FERRA, LYDIA MUNOZ MORALES, CHARLES H. QUILES MARIANI, MIGUEL A. ALVELO RODRIGUEZ, CRISTINA CANCEL CUEVAS, MARIA D. GUERRA NAVARRO, KREMLLY RODRIGUEZ VALENTIN, URSULA AGUILAR QUINTERO, YOLANDA ANGUITA DE RIOS, VIRGINIA ARROYO OTERO, CARMEN ZORAIDA ARROYO QUILES, BLANCA CACHO COLLAZO, BIENVENIDO CASTRO DEL VALLE, RAMON DE JESUS SIERRA, SYLVIA M. DENIS, ENRIQUE DIAZ MALDONADO, GLORIA ECHEVARRIA DE BURGOS, JUAN FUMERO SOTO, VICTOR MARTINEZ TORRES, JOSE R. MUNOZ RIVERA, CARMEN ORTIZ LEMOIS, MARIA V. PAGAN SEDA, RAMON A. PEREZ RAMIREZ, JORGE O. PRINCIPE GALARZA, AMINTA RIVERA CARDONA, AIDA RODRIGUEZ RIOS, GASPAR RODRIGUEZ RODRIGUEZ, SYRAIDA ROSA CARDONA, JOSE A. SURILLO RODRIGUEZ, SARA VELAZQUEZ CONCEPTION, LESLY F. LOPEZ MIRANDA, CARMEN I. LUGO SOTERO, JOSE D. NIEVES RIVERA, ANTONIO VEGA ORTIZ, SAQUIA AZIZE MAWAD, IRMA I. BALDONI DE VALENCIA, FANNY CACHO DE FREYTES, JULIA MARTINEZ VDA. CALDERON, CARMEN M. MORALES HERNANDEZ, ANA MERCEDES ORTIZ COLON, EVELYN PINGHETTI DELGADO DE PINERO, CARMEN ROMAN DE MOLINA, ENRIQUE ROSADO ALVERIO, LLBA ROSARIO DE BRAVO, NOELIA TORRES DE CANTRES, IRIS CAMELIA VELEZ MORALES, CARMEN GARCIA ROSADO, PAHITA GUADALUPE GARCIA, FRANCISCO BONILLA OCASIO, HERIBERTO GALLARDO GUTIERREZ, JOSE MELENDEZ PINERO, ANGEL LUIS ALLENDE VELAZQUEZ, JOSE A. ALVARADO, CECILIO ALVAREZ PLAJAS, CLAUDIO AVILES NAVARRO, JOSE E. APONTE DE LA TORRE, HILDA BENITEZ CONCEPTION, ANTONIA BETANCOURT ESPINOSA, NILSA CARDONA FLORES, DORA CASTRO DE AGUILAR, MARIA E. CASTRO GIBOYEAUSE, WILFREDO CINTRON SANTANA, JULIO E. COLON, ANGELA L. COLON SANTIAGO, ELBA M. COLON TORRES, BENJAMIN CORDERO QUINONES, ALVARO CRESPO MENDEZ, ROBERTO CRUZ CRUZ, JOAQUIN CRUZ MENDEZ, ZORAIDA CRUZ RIVERA, EDDA L. DE AYALA LAFUENTE, BLANCA GONZALEZ MARIN, SANTIAGO GONZALEZ VELAZQUEZ, ANDRES A. HERNANDEZ ORTIZ, EVELYN IRIZARRY ESCOBAR, TERESA LEON ROSADO, JOSEFA MARRERO AYALA, ANGEL LUIS MARRERO GONZALEZ, CARMEN H. MONTES VELEZ, FIDELINA MORALES CASANOVA, CARMEN L. NEGRON MARIN, RAMON NORAT ZAYAS, CARMEN NUNEZ RIVERA, HERMINTA A. ORTIZ ORTIZ, JOSE ORTIZ RIVERA, CARMEN D. PEREZ ROMAN, ANGEL S. PEREZ TOLEDO, BIENVENIDO RIVERA DIAZ, RAFAEL RIVERA FERNANDEZ, JUAN RIVERA PAGAN, PAULITA RODRIGUEZ CRESPO, ANTONIO RODRIGUEZ RIVERA, REINALDO RODRIGUEZ SOLIVAN, NEMUEL ROSAS LEBRON, JOSE MANUEL ROSADO SANCHEZ, GLADYS ROSARIO ACEVEDO, AIDA L. SANCHEZ DE NEGRON, IRAIDA SANCHEZ MARQUEZ, AIDA E. SANTIAGO DE ORTA, LAURA L. SANTOS ROA, AURORA SIERRA PIZARRO, EFRAIN TACORONTO ORTIZ, EDUARDO TARAFA GONZALEZ, ISAIAS TORRES SANCHEZ, JOSE A. TORRES PEREZ, RAMON A. VEGA CRUZ, ROBERTO VELAZQUEZ NIEVES, NELSON VELEZ QUINONES, WILLIAM VILLOCK TOUSET, JOSE MARRERO LUNA, FELIPE ODIOTT MORALES, AGUSTIN LAO COLON, MIGUEL AYALA CINTRON, JACOBO CARRASQUILLO OLMEDO, ANGEL COLLAZO SIERRA, MANUEL FIGUEROA RODRIGUEZ, CARMEN M. LLaBRES GUEVARA,

PEDRO I. RIVERA CORREA, and ENIC M. ALVAREZ SOTO,
*Plaintiffs*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

*Defendants*.

## AMENDED COMPLAINT

TO THE HONORABLE COURT:

NOW COME the Plaintiffs and through their undersigned attorneys very respectfully claim, allege, and request as follows:

1. This is an action for declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. §1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. §249(e), 18 L.P.R.A. 211, and 18 L.P.R.A. 214, *et seq*.

2. The jurisdiction of this Court is founded upon 28 U.S.C. §1331 and 1343 (3) and (4). The amount in controversy exceeds $10,000.00, exclusive of interests and costs.

3. The Plaintiffs in this action are residents of Puerto Rico and employees of the Department of Public Education of the Commonwealth of Puerto Rico (referred to hereinafter as "the Department").

4. The Defendants in this action are:

(a) Carlos Chardon, who is, and at all times herein relevant was, the Secretary of Public Education of Puerto Rico. In this capacity, he has ultimate responsibility for the supervision and administration of the Department, including determination of the employment status of the Plaintiffs and those in their class. Defendant Chardon is sued in his individual and official capacities.

(b) Oscar Ramos, who is, and at all times herein relevant was, the Assistant Secretary of Public Education in Charge of Personnel of Puerto Rico. In this capacity, he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the Plaintiffs and those in their class. Defendant Ramos is sued in his individual and official capacities.

5. On November 2, 1976, Puerto Rico held a gubernatorial election. In this election, the candidate of the Popular Democratic Party (referred to hereinafter as the "PDP") was incumbent Governor Rafael Hernandez Colon. Former Governor Hernandez Colon was defeated by Governor Carlos Romero Barcelo, who was the candidate of the New Progressive Party (referred to hereinafter as the "NPP"). Governor Romero Barcelo took office on January 2, 1977.

6. Governor Romero Barcelo appointed Mr. Herman Sulsona as Secretary of Public Education, and Sulsona, in turn, appointed defendant Ramos as Assistant Secretary of Public Education in Charge of Personnel. Both Sulsona and Defendant Ramos assumed their positions on or about January 3, 1977. Both Sulsona and Defendant Ramos are members and active in the affairs of the NPP.

7. On or about March 13, 1977, Mr. Sulsona resigned as Secretary of Public Education, and Governor Romero Barcelo appointed Defendant Chardon as his successor. Defendant Chardon assumed the position of Secretary of Public Education on or about March 31, 1977. Defendant Chardon is a member and active in the affairs of the NPP.

8. All the Plaintiffs mentioned in the caption of this complaint were employed by the Department of Education during the 1976-77 school year, without permanent status; in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians, in the manner more specifically detailed in the last paragraph of this complaint, the one immediately preceding the prayer. They had been promoted to their respective positions, on the basis of their merits, from lower positions in which each of them did have and enjoy permanent status within the meaning of 18 L.P.R.A. 211 and was protected by 18 L.P.R.A. 214, *et seq.* Each Plaintiff was demoted to his previous position, such demotion to take effect at the beginning of the 1977-78 school year. This last action on the part of Defendants also deprived Plaintiffs of their constitutional rights and, in particular, constituted a violation of their rights under the First and Fourteenth Amendments of the Constitution of the United States. The aforementioned positions in which Plaintiffs were employed during the 1976-77 school year involved functions of school administration. They were not policy-making positions, and no Plaintiff did participate in the formulation of policies relating to the operation of the Department. They had to follow polices formulated at the Department's level.

9. All Plaintiffs are, and at all times herein relevant were, members and active in the affairs of the PDP or political parties other than the NPP. On information and belief, the defendants are, and at all times herein relevant were, aware of Plaintiffs' political association with their respective parties, even if they did not know them personally.

10. On or about June, 1977, each Plaintiff received a letter, signed by Julio Cintron Lopez, Director of the Personnel Division of the Department, removing him from his position, effective at the beginning of the 1977-78 school year, and reassigning him to his previous position in the Department. A copy of each of the aforesaid letters is attached to this complaint as

*Attachment A*, and made a part hereof. Each Plaintiff's permanent position, to which he was assigned as per the corresponding letter (of the ones mentioned above), is lower in rank and compensation than the non permanent he held until then, and, therefore, his reassignment constitutes a demotion. On or about June, 1977, each Plaintiff wrote a letter to Defendant Chardon, in which he objects his removal from his position and announces that he is taking the necessary steps towards the corresponding legal action. A copy of each one of such letters is attached to this complaint as *Attachment B*, and made a part hereof.

11. The letter received by each Plaintiff sets forth no reason for his removal from his non permanent position he held and there was no legitimate reason for any one of such removals. No notice, hearing, nor any other form of due process was awarded in any case.

12. At the beginning of the 1977-78 school year, each Plaintiff was actually removed from the non permanent position in which he was employed during the 1976-77 school year, and demoted to his permanent position in the Department. As of the date of this complaint, he is serving in the latter position.

13. Substantially all of the persons who were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians and who were members and/or active in the affairs of the PDP or political parties other than the NPP were removed from their positions at the end of the 1976-77 school year or the beginning of the 1977-78 school year; and substantially all of the persons who were employed during the 1976-77 school year without permanent status in the aforesaid positions and who were not members and/or active in the affairs of the PDP or political parties other than the NPP were not removed.

14. All the supervisory positions in which Plaintiffs were employed during the 1976-77 school year have been filled for the 1977-78 school year.

15. Plaintiffs allege that the Defendants removed them from their respective supervisory positions at the beginning of the 1977-78 school year and demoted them to their respective previous positions solely because of their political association with the PDP or parties other than the NPP, and that they would not have been removed and demoted but for such association.

16. Plaintiffs allege that the aforesaid actions by the Defendants constitute a violation of their rights under the First and Fourteenth Amendments to the United States Constitution. They also allege that said actions are contrary to and contravene the rights acquired by them under the provisions of 18 L.P.R.A. 214, *et seq*. They further aver that as career public servants (empleados publicos de carrera) they had the legitimate expectation to remain in their respective positions to which they had been promoted (and from which they were demoted by Defendants) and that they could not be removed or demoted from those positions except for cause.

17. The Defendants knew, or reasonably should have known, that removing Plaintiffs from their respective supervisory positions and demoting them to their previous position because of their political association with the PDP or parties other than the NPP was a violation of their rights under the First and Fourteenth Amendments to the United States Constitution. The Defendants acted maliciously, willfully, and in wanton and reckless disregard of Plaintiffs' constitutional rights when they took the aforesaid actions, all in violation of Plaintiffs' civil rights, as provided in Section 1983, 42 U.S.C.A.

18. The action of the Defendants in removing Plaintiffs as stated above constituted a violation of their rights under the First and Fourteenth Amendments to the United States Constitution; constituted a violation of their civil rights as provided in Section 1983, 42 U.S.C.A., and constituted a violation of

their rights under the laws of Puerto Rico, specifically (in addition to §214 mentioned in paragraph 16), under Section 249(a) and (e), of Title 18, L.P.R.A.

Section 249 (a) of 18 L.P.R.A. provides as follows:

> "By public school teachers shall be understood, for the purposes of sections 249 a-249e of this title, teaching personnel, which includes both the teachers in charge of teaching and special services directly connected with the teaching work, and the officers or employees in technical takss or in school supervision and administration . . . ."

Section 249 (e) of 18 L.P.R.A. provides as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, any other matters relative to the teacher's professional work or status."

19. Plaintiffs invoke the pendent jurisdiction of the Court to hear and decide their claim based upon the above-quoted provisions of Puerto Rico law, and Sections 214, *et, seq.* of 18 L.P.R.A.

20. The plaintiff's in this action are enumerated as follows in this allegation together with a description of the position from which they were demoted and the position to which they were demoted.

| Name | Position from which demoted | Position to which demoted |
|---|---|---|
| Arzon Mendez, Angel L. | Supt. II, Ceiba | Supt. III, Loiza |
| Cruz Beltran, Carlos | Supt. III, Loiza | Director Secondary School, Patillas |
| Lopez de Ferra, Aida A. | Supt. III, Ciales | Asst. Supt. III, Ciales |

| Name | Position from which demoted | Position to which demoted |
|---|---|---|
| Munoz Morales, Lydia | Supt. III Aguas Buenas | General Supervisor II, Caguas |
| Quiles Mariani, Charles H. | Supt. V., Ponce - West | General Supervisor V, Ponce |
| Alvelo Rodriguez, Miguel A. | Asst. Supt. III, Aguas Buenas | Director, Sec. School III, Barranquitas |
| Cancel Cuevas, Cristina | Asst. Supt. II, Jayuya | Director, Elem. School III, Jayuya |
| Guerra Navarro, Maria D. | Asst. Supt., Loiza | |
| Rodriguez Valentin, Kremlly | Asst. Supt. III, Ciales | Director, Elem. School III, Ciales |
| Aguilar Quintero, Ursula | General Superv. III - Spanish Arecibo | Secondary School Teacher, Vega Alta |
| Anguita de Rios, Yolanda | General Supt. III - Dept. Home Ec. | Home Ec. Teacher, Villalba |
| Arroyo Otero, Virginia | General Superv. V - Dept. Title VI - D, PL 93-380 | Director Elem. School IV, Catano |
| Arroyo Quiles, Carmen Zoraida | Zone Superv. English | Secondary School Teacher - English, Hatillo |
| Cacho Collazo, Blanca | General Superv. III - Dept. Fed. Program | Director - Elem. School II, Rio Piedras "C" |
| Castro del Valle, Bienvenido | General Superv. IV Dept. Ed. and Working Centers | Zone Health Supervisor, San Juan |
| De Jesus Sierra, Ramon | Zone Supervisor - English, Adjuntas | Secondary School Teacher - English, Lares |
| Denis, Sylvia M. | General Superv. I Music Program Dept. | Music Teacher, Rio Piedras - D |

| Name | Position from which demoted | Position to which demoted |
|---|---|---|
| Diaz Maldonado, Enrique | General Superv. V Title I - Depart. III | Asst. Superv. III, Aguas Buenas |
| Echevarria de Burgos, Gloria | General Superv. Home Ec., San Juan | Home Ec. Teacher, Rio Piedras "C" |
| Fumero Soto, Juan | General Superv. I - School and Comm. Relations Program | English Teacher, Arecibo |
| Martinez Torres, Victor | General Superv. School and Comm. Relations Program | |
| Munoz Rivera, Jose R. | General Superv. IV. Dept. | General Superv. III - San Juan |
| Ortiz Lemois, Carmen | General Superv. V. | General Superv. I, Evaluation Program Dept. |
| Pagan Seda, Maria V. | Zone Superv. English, Cabo Rojo | Elementary English Teacher, Cabo Rojo |
| Perez Ramirez, Ramon A. | General Superv. VI - Dept. | Asst. Supt. IV, Utuado |
| Principe Galarza, Jorge O. | General Superv. II - English, Humacao | Zone Superv. III, Juncos |
| Rivera Cardona, Aminta | General Superv. IV, Job Corps Program | Vocational Counselor |
| Rodriguez Rios, Aida | General Superv., Humacao | Director III Elementary School, Guaynabo |
| Rodriguez Rodriguez, Gaspar | General Superv. Adult Ed. Program, Caguas | Secondary Teacher English, Cidra |

| Name | Position from which demoted | Position to which demoted |
|---|---|---|
| Rosa Cardona, Syraida | General Superv. III | Secondary School Teacher, Rio Piedras "C" |
| Surillo Rodriguez, Jose A. | General Superv. I Coop Ed. Program, Humacao | Director III Elementary School, Yabucua |
| Velazquez Concepcion, Sara | General Superv. Comm. Ed. Program | Comm. Ed. Teacher, San Juan |
| Lopez Miranda, Lesly F. | Health Superv. III (Zone), Naguabo | |
| Lugo Sotero, Carmen I | Health Superv., Guayanilla | Secondary School Teacher, Guayanilla |
| Nieves Rivera, Jose D. | Health Superv. Zone, Naranjito | High School Teacher, Naranjito |
| Vega Ortiz, Antonio | Health Superv. III (Zone), Barranquitas | High School Teacher, Barranquitas |
| Azize Mawad, Saquia | Executive Director II (Home Econ.) P.E.D., Hato Rey | General Superv. (Home Econ.) |
| Baldoni de Valencia, Irma I. | General Superv. IV. P.E.D. Hato Rey | English Superv. Zone III, Rio Piedras "B" |
| Cacho de Freytes, Fanny | Executive Director II (Title I Evaluation Program) | General Superv. V. (English) P.E.D., Hato Rey |
| Martinez Vda. Calderon, Julia | Vice-Director (Home Economics), Central Office | Home Economics Teacher |
| Morales Hernandez, Carmen M. | Executive Director I, Central Office | General Superv. III - Adult Ed. Program - Central Office |

| Name | Position from which demoted | Position to which demoted |
|---|---|---|
| Ortiz Colon, Ana Mercedes | Asst. Director (Special Voc. Program) P.E.D., Hato Rey | Vocational Counselor, Rio Piedras "A" |
| Pinghetti Delgado de Pinero, Evelyn | Executive Director Ed. Serv. Center & Public Library Ponce | Elementary School Director II - Ponce-West |
| Roman de Molina, Carmen | Asst. Director (Vocational Program) P.E.D., Hato Rey | Home Econ. Teacher Rio Piedras "A" |
| Rosado Alverio, Enrique | Executive Director (Ed. Serv. Center) P.E.D., Hato Rey | High School, Director V, Bayamon-South |
| Rosario de Bravo, Elba | Director Executive II - P.E.D., Hato Rey | General Superv. V - P.E.D., Hato Rey |
| Torres de Cantres, Noelia | Asst. Director (Business Ed. Program) P.E.D., Hato Rey | Business Education Teacher, Rio Piedras "B" |
| Velez Morales, Iris Camelia | Executive Director II - External Aids Program | General Superv. III - P.E.D., Hato Rey |
| Garcia Rosado, Carmen | Curriculum Teacher (Career Ed Proyect) Bayamon - South | Secondary School Teacher, Rio Piedras "C" |
| Guadalupe Garcia, Pahita | Curriculum Teacher III - P.E.D., Hato Rey | Secondary School Teacher, Gurabo |
| Bonilla Ocasio, Francisco | Relation Coordinator, Las Marias | |

| Name | Position from which demoted | Position to which demoted |
|---|---|---|
| Gallardo Gutierrez, Heriberto | Coordinator (School Community Relation), Guayanilla | School Teacher |
| Melendez Pinero, Jose | Coordinator, Naguabo | Elementary School Teacher |
| Allende Velazquez, Angel Luis | Elementary School Director III | Elementary School-Teacher |
| Alvarado, Jose A. | Vocational School Director II | English Secondary School Teacher |
| Alvarez Plajas, Cecilio | Vocational School Assistant Director II | Offices and Industries School Teacher |
| Aviles Navarro, Claudio | Second Unit Director IV | Secondary School Teacher |
| Aponte de la Torre, Jose E. | Vocational School Director III | Industrial Arts School Teacher |
| Benitez Concepcion, Hilda | Elementary School Director II | Elementary School Teacher |
| Betancourt Espinosa, Antonia | | Elementary School Director III |
| Cardona Flores, Nilsa | Second Unit Director | Secondary School Teacher |
| Castro de Aguilar, Dora | Secondary School Assistant Director III | Secondary Social Science School Teacher |
| Castro Giboyeause, Maria E. | Secondary School Assistant Director IV | Second Unit School - Director III |
| Cintron Santana, Wilfredo | Work and Education Center - Director IV, Secondary Level | |

| Name | Position from which demoted | Position to which demoted |
|---|---|---|
| Colon, Julio E. | Work and Education Center Director | |
| Colon Santiago, Angela L. | Secondary School Director V | Secondary School Director IV |
| Colon Torres, Elba M. | Elementary School Director III | Elementary School Teacher |
| Cordero Quinones, Benjamin | Intermediate School Director III | Secondary School Director II |
| Crespo Mendez, Alvaro | Secondary School Assistant Director | Secondary School Teacher |
| Cruz Cruz, Roberto | Work and Education Center Director | Industrial Arts Teacher |
| Cruz Mendez, Joaquin | Elementary School Director II | Elementary School Teacher |
| Cruz Rivera, Zoraida | Secondary School Director III | Secondary School Teacher |
| De Ayala Lafuente, Edda I. | Intermediate School Director IV | Secondary School Director III |
| Gonzalez Marin, Blanca | Secondary School Director IV | Elementary School Director II |
| Gonzalez Velazquez, Santiago | Intermediate School Director III | Secondary School Director II |
| Hernandez Ortiz, Andres A. | Work and Education Center Director | Elementary School Teacher |
| Irizarry Escobar, Evelyn | Secondary School Director III | Secondary English Teacher |
| Leon Rosado, Teresa | Secondary School Director III | Home Economics School Teacher |
| Marrero Ayala, Josefa | Second Unit School Director III | Library Teacher |

| Name | Position from which demoted | Position to which demoted |
|---|---|---|
| Marrero Gonzalez, Angel Luis | Second Unit School Director III | Elementary School Teacher |
| Montes Velez, Carmen H. | Elementary School Director IV | Elementary School Director II |
| Morales Casanova, Fidelina | Secondary School Director | Zone - English Supervisor III |
| Negron Marin, Carmen L. | Secondary School Assistant Director III | Secondary School Teacher |
| Norat Zayas, Ramon | Elementary School Director II | Secondary School Teacher |
| Nunez Rivera, Carmen | Secondary School Director III | Secondary School Teacher |
| Ortiz Ortiz, Herminia A. | Secondary School Director III | Secondary School Teacher |
| Ortiz Rivera, Jose | Secondary School Director IV | Secondary School Teacher |
| Perez Roman, Carmen D. | General Supervisor III | |
| Perez Toledo, Angel S. | Elementary School Director III | Elementary School Teacher |
| Rivera Diaz, Bienvenido | Second Unit Director III | Elementary School - Director II |
| Rivera Fernandez, Rafael | Intermediate School Director IV | Elementary School Director II |
| Rivera Pagan, Juan | Director Work and Education Center | |
| Rodriguez Crespo, Paulita | Elementary School Director II | Elementary School Teacher |
| Rodriguez Rivera, Antonio | Sub-Director Work and Education Center | Elementary School Teacher |

| Name | Position from which demoted | Position to which demoted |
|---|---|---|
| Rodriguez Solivan, Reinaldo | Technological Institute Director | Technical Related Subjects Teacher |
| Rosas Lebron, Nemuel | Director Work and Education Director II | |
| Rosado Sanchez, Jose Manuel | Sub-Director Work and Education Center | General Supervisor III, Adult Basic Education |
| Rosario Acevedo, Gladys | Second Unit Director III | Elementary School Teacher |
| Sanchez de Negron, Aida L. | Elementary School Director | |
| Sanchez Marquez, Iraida | Second Unit School Director V | Elementary School Director II |
| Santiago de Orta, Aida E. | Elementary School Director III | Secondary School Teacher |
| Santos Roa, Laura L. | Elementary School Director II | Elementary School Teacher |
| Sierra Pizarro, Aurora | Elementary School Director III | Elementary School Director II |
| Tacoronte Ortiz, Efrain | Elementary School Director II | Library School Teacher |
| Tarafa Gonzalez, Eduardo | Second Unit School Director | Elementary School Director III |
| Torres Sanchez, Isaias | Elementary School Director | Secondary School Teacher |
| Torres Perez, Jose A. | Secondary School Director III | Vocational Counselor |
| Vega Cruz, Ramon A. | Vocational Director III | |
| Velazquez Nieves, Roberto | Elementary School Director III | Secondary School Teacher |
| Velez Quinones, Nelson | Secondary School Director IV | Secondary School Director III |

| Name | Position from which demoted | Position to which demoted |
|---|---|---|
| Villock Touset, William | Elementary School Director III | Elementary School Director III |
| Marrero Luna, Jose | Work and Ed. Center Director | Vocational Adviser |
| Odiott Morales, Felipe | Director Night School | Director Secondary Unit |
| Lao Colon, Agustin | General Superv. School Comm. | General Superv. Coop. Ed. Program |
| Ayala Cintron, Miguel | Special Teacher Spanish High School | Intermediate School Teacher |
| Carrasquillo Olmedo, Jacobo | Vocational High School Teacher | Work and Education Center |
| Collazo Sierra, Angel | Physical Ed. Teacher, Work and Education Center | Physical Education Teacher |
| Figueroa, Rodriguez, Manuel | High School Teacher, Cabinet Making | Offices and Industries, Intermediate School Teacher |
| Llabres Guevara, Carmen M. | Elementary English and Science Teacher | Secondary School Teacher |
| Rivera Correa, Pedro I. | Physical Ed. Teacher, Work and Education Center | |
| Alvarez Soto, Enic M. | Vocational Superior School Teacher | Elementary School Teacher |

WHEREFORE, the Plaintiffs respectfully request from this Court that it:

1. Declare that the Defendants:

(a) in removing the Plaintiffs from the positions in which they were employed during the 1976-77 school year, violated their rights under the First and Fourteenth

Amendments to the United States Constitution and under Section 1983 of 42 U.S.C.A.; and also violated their rights under Sections 249(a) and (e) and 214, *et seq.* of Title 18 L.P.R.A.

2. Order that Defendants:

(a) reinstate all Plaintiffs to the position in which each of them was employed during the 1976-77 school year and from which he was dismissed or demoted in violation of their rights under the statutes mentioned in the complaint.

(b) pay to each Plaintiff full back pay for the period from the date of his removal or demotion from the positions in which he was employed during the 1976-77 school year until the date of his reinstatement to that or other substantially equivalent position, including prejudgment interests, less any pay received by him from the Department during the period in question.

(c) pay to the Plaintiffs all damages proximately resulting from defendants' wrongful actions;

(d) pay to the Plaintiffs punitive damages in the amount of $2,500,000.00; and

(e) be enjoined permanently from removing any person from a non-policy making position with the Department because of such person's political association.

3. Award to the Plaintiffs:

(a) costs and reasonable attorneys' fees; and

(b) such other and further relief as this Court shall find to be just and proper.

RESPECTFULLY SUBMITTED. In San Juan, Puerto Rico, this 5th. day of October, 1978.

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/s/ By Hiram R. Cancio

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

**CIVIL NUMBER: 78-1156**

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, *et al.*, *Defendants*.

**DECISION AND ORDER**

Plaintiff, Ortiz Rivera, is presently a high school teacher in Orocovis, Puerto Rico. In this position he has tenure within the Department of Education. During the 1976-77 school year he was promoted to the position of Director of Schools in Orocovis. At the commencement of the 1977-1978 school year he was notified that he was being reinstated in his previous teacher position. Plaintiff avers that this demotion was due entirely to his political beliefs. Defendants retort that this demotion was requested voluntarily by Plaintiff and, irrespectively, that the appointment as Director was soley for a one year term. This matter is now before us on Defendants' Motion for Summary Judgment.

Summary Judgment pursuant to Rule 56, Fed. R. Civ. P. is proper "if the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." This is a high standard. *Thyssen Plastik Anger Kg.* v. *Induplas, Inc.*, 576 F.2d 400 (C.A. 1, 1978).

> "In determining whether summary judgment is appropriate the court must 'look at the record . . .in the light most favorable to . . . the party opposing the motion . . .'

> Similarly the court must indulge all inferences favorable to the party opposing the motion . . .
>
> "The language of Rule 56(c) sets forth a bifurcated standard which the party opposing summary judgment must meet to defeat the motion. He must establish the existence of an issue of fact which is both 'genuine' and 'material.' A material issue is one which affects the outcome of the litigation. To be considered 'genuine' for Rule 56 purposes a material issue must be established by 'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial.' The evidence manifesting the dispute must be 'substantial', going beyond the allegations of the complaint." *Hahn* v. *Sargent*, 523 F.2d 461, 464 (C.A. 1, 1975). (Citations omitted).

The factual materials before us reveal the following: By letter of the former Secretary of Education, August 17, 1976, Plaintiff was named a Director in the Island's educational system. Said letter reads:

> "It is my pleasure to inform you that I have reassigned you to position number 0100, Secondary Director IV in the Orocovis School District. This promotion reassignment will be effective immediately and have substitute character with a monthly salary of $915.00.
>
> "Your contract will be subject to renewal upon termination of each school year according to the recommendation of your immediate supervisor and the necessities of the service. You will be considered for probationary or permanent assignment to the position I am now assigning you in accordance with established norms." (translation ours).

Plaintiff remained in this position during the school year 1976-1977. In May, 1977 Plaintiff informed the Superintendent of Schools both verbally and in written form the following:

> "I am pleased to inform you that I have decided to return to the position of Social Studies teacher in which I have tenure in high school, at the commencement of the 1977-1978 school year. To this effect I am requesting use of regular accumulated vacation which on May 31, are 43 days. This petition is made because to change my position in personnel category would mean the loss of regular leave

> have not used. Another reason in making this decision is that I have to attend to the health of one of my children during the summer and I personally need a good recess. I hope to continue serving our society from the key position of classroom school teacher." (Translation ours).

A sworn statement by the Superintendent of Schools of Orocovis verifies Plaintiff's request. Plaintiff does not deny that he so informed the Superintendent of his desire to return to teaching. He does contend that shortly after notifying the Superintendent he changed his mind and now wanted to remain as Director. He claims he did not withdraw the letter because: (1) he did not believe it had any legal effect because it was never notified to anyone else; and (2) the decision to demote him had already been made at the Department level. (Plaintiff's Sworn Statement of September 30, 1978). Said decision was notified to Plaintiff by letter of June 21, 1977:

> "As you know the appointment to the position you now occupy expires with the termination of the present school year.
>
> "While we appreciate your collaboration we remind you that you are correspondingly reinstated to the position in which you have tenure in the system. To this effect our Personnel Division is proceeding to reinstate you to position number 0129 which is as Secondary School Teacher in Orocovis District effective at the commencement of the next school year." (Translation ours).

Under §1983 there exist a cause of action for political discrimination in public employment. *Elrod* v. *Burns*, 427 U.S. 347 (1976). It is clear here that Plaintiff had tenure as a high school teacher. However, he has come forth with no evidence demonstrative of tenure as a Director.[1] Though this does not

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[1] There is nothing provided in 18 L.P.R.A. §§ 211 or 249 to the contrary.

automatically bar all avenues of relief, see: *Perry* v. *Sinderman*, 408 U.S. 593 (1972), it does affect Plaintiff's Motion.

As a non-tenured director with a year-to-year renewable contract, Plaintiff could permissably have been demoted at the end of the first year. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). But the fact that Plaintiff could validly be demoted does not mean that Plaintiff is unprotected from constitutionally impermissable factors within this same demotion. *Mt. Healthy City School District Board of Education* v. *Doyle*, 427 U.S. 274 (1972); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). The burden of showing a discriminatory reason for the demotion rested initially with Plaintiff. This initial burden of demonstrating a prima facie case of discrimination was met by Plaintiff. The complaint alleges: (1) that Plaintiff is of a certain political affiliation, par. 6, 7; (3) that this was known to Defendants, par. 9, 17; (4) that Plaintiff was qualified to remain in his promoted position, par. 8; (5) that despite these qualifications he was demoted, pars., 10, 11, 12 13; (6) that after this demotion the position was filled by a person of another political affiliation, pars. 13, 14; and this was exclusively politically motivated, par. 15. After this prima facie showing the burden of demonstrating a non-discriminatory reason for the demotion shifted to Defendants. *McDonnell Douglas Corp.*, supra, p. 802.[2] Thus, in the factual situation at hand Defendants, as the moving party in summary judgment, had the burden not only of demonstrating that a permissible factor could have motivated the demotion but also that no impermissible factor was involved. *Mack* v. *Cape Elizabeth School Board*, 553 F.2d 720 (C.A. 1, 1977). This is so even though at trial Defendants would have no burden and Plaintiff must prove that the impermissible factor was determinative. *Id.* at p. 722.

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[2] Though the *McDonnell* test was formulated under a Title VII Civil Rights claim it is applicable by analogy to a § 1983 Civil Rights claim. See e.g. *Huntley* v. *Community School Board of Brooklyn*, 543 F.2d 979 (C.A. 2, 1976).

In the case at bar, though Defendants' affidavits are most adequate on the first point, and admittedly make a Plaintiff's case a weak one, they fail to address themselves to the second point. Under the exacting standard of summary judgment as outlined above Defendants' extrinsic evidence must have also demonstrated that no discriminatory factors influenced the demotion. *Mack* v. *Cape Elizabeth School Board*, supra. In that this decisional element is absent summary judgment is precluded.

We must of necessity address ourselves to one last point before concluding. Pending in this action is a Motion for leave to file an amended complaint which would add approximately one hundred named Plaintiffs and attempts to circumvent the Court's prior ruling denying class certification. A perusal of the amended complaint reveals that as regards the additional Plaintiffs, the complaint fails to meet the requirements of Rule 20 or 21 of F.R.C.P. and it is thus rejected.

The Motions for Summary Judgment and to Amend the Complaint are hereby DENIED. The Pretrial and trial settings are continued *sine die*.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 21st day of November, 1978.

/s/ JUAN R. TORRUELLA
Juan R. Torruella
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary of Public Education in Charge of Personnel of the Commonwealth of Puerto Rico,

*Defendants.*

**MOTION FOR RECONSIDERATION AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

TO THE HONORABLE COURT:

NOW comes the plaintiff and through its undersigned attorneys respectfully prays, alleges and set forth:

**STATEMENT OF THE CASE**

1. A complaint was filed on June 16, 1978 requesting declaratory and injunctive relief, back pay, damages and other relief arising under the First & Fourteenth Amendments to the Federal Constitution, Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. Sec. 1983; 28 U.S.C. Sec. 2201, 2202, 18 L.P.R.A., Sec. 249 (e) and 18 L.P.R.A. 214, et seq., for plaintiff, Mr. Jose Ortiz Rivera on behalf of himself and all members of his class similarly situated, under Rule 23 of the Federal Rules of Civil Procedure. The jurisdiction of this Honorable Court was invoked under 28 U.S.C., Sec. 1331 and 1343(3) and (4), the amount in controversy exceeding $10,000.00 exclusive of interests and costs.

2. On August 21, 1978 this Honorable Court, upon hearing both parties, held that the present case could not be certified as a class action under Rule 23 of the Federal Rules of Civil Procedure because it did not meet the requisite of Rule 23(a)(1), which states, inasmuch as pertinent to the ruling of this Court, that:

> "One or more members of the class may sue or be sued as representative parties on behalf of all only if (1) *the class is so numerous that joinder of all members is impracticable.*"

3. Upon the aforementioned decision, plaintiff filed a Motion for Reconsideration on September 7, 1978. This Honorable Court denied the requested Reconsideration on the same grounds on September 28, 1978.

4. On October 2, 1978 plaintiff entered a "Motion Under Rule 15 F.R.C.P. Requesting Leave of Court to Amend Complaint," the amendment consisting of the addition as individual parties of all the purpoted members of the class in the original complaint.

5. On the 13th day of October, 1978, defendants filed a Motion entitled "Motion in Opposition to Plaintiff's Motions of October 3 and October 2, 1978 and for Extension of Time to Enter a Reply," basing their objections on the following:

(1) that "there has already been an Answer to the Complaint filed in the present case by the appearing co-defendants on September 28, 1978";

(2) that "there is a Motion for Summary Judgment filed in the present case by the appearing co-defendants on August 15, 1978, which we respectfully understand is dispositive of the instant case in its entirety", and

(3) that "there are various aspects in both of these Motions, which we respectfully submit are contrary to law and jurisprudence and to the local Rules of Procedure, which deserve to be amply discussed by these co-defendants before this

Honorable Court finally considers both of plaintiff's Motions before it"

6. On October 24, 1978 plaintiff filed an Informative Motion in which defendant's objections (1) and (2) were amply discussed and replied to.

7. On November 2nd, 1978 defendants filed a "Motion in Opposition to Plaintiff's request for Leave of Court to Amend Complaint and Memorandum of Law in Suport Thereof, "basing their objections in the following:

> "Motion should not be granted according to the interpretation of Rule 15 of Federal Rules of Civil Procedure."

This Motion was duly replied to on November 9, 1978 by way of Plaintiff's Motion to Opposition to Defendants Motion Opposing Plaintiff's Request to Amend Complaint.

8. On November 24, 1978 plaintiff received copy of this Honorable Court's Decision and Order of November 21st. 1978, which, denies Plaintiff's Motion Seeking Leave of Court to File an Amended Complaint, stating:

> "Pending in this action is a Motion for leave to file an amended complaint which would add approximately one hundred named plaintiffs and attempts to circumvent the Court's prior ruling denying class certification. A perusal of the amended complaint reveals that as regards the additional plaintiffs, the complaint fails to meet the requirements of Rule 20 or 21 of FRCP and is thus rejected."

Plaintiff respectfully requests a reconsideration of said Decision and Order, on the following:

**ARGUMENTS**

1. Rule 20 of the Federal Rules Civil Procedure does not bar joinder of the additional parties in this action. Rule 20(a) provides:

> "Permissive Joinder: All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative in respect of or arising out of the same

transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action . . . . . A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Commenting on said rule, Wright & Miller, *Federal Practice and Procedure*, Vol. 7, § 1652-1653, states:

"The purpose of the rule is to promote trial convenience [*Hagler* v. *Admiral Corp.*, 248 F2d. 319 (CA 2d., 1957); *Anderson* v. *Frances I Du Pont & Co.*, 291 F. Supp. 705 (D.C. Minn., 1968); *General Inv. Co.* v. *Ackerman*, 37 FRD 38 (D.C. NY, 1964)] and expedite the final determination of disputes [*Rumbaugh* v. *Winifrede R.R. Co.* 331 F2d. 530 (CA 4th., 1964); *Stanley Works* v. *Haigger Potteries, Inc.*, 35 FRD 551 (D.C. Ill. 1964] thereby preventing multiple lawsuits . . . . . Joinder of parties under Rule 20(a) is not unlimited as is true of the joinder of claims under Tule 18(a). The rule imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence and (2) some question of law or fact common to all the parties will arise in the action. Both of these requirements must be satisfied in order to sustain party joinder under Rule 20(a) . . . Instead of developing one generalized test for ascertaining whether or not a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, the courts seem to have adopted a case by case approach . . . This approach is reminiscent of the logical relationship test which has been judicially developed as a gloss on the words 'transaction or occurrence' used in the compulsory counterclaim provision in Rule 13(a). For purposes of that rule, all *logically related* events entilling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. The logical relationship test employed under Rule 13(a) seems consistent with the philosophy underlying the passage of Rule 20 that allows joinder of parties whenever the claims arise out of 'the same series of transactions or occurrences.' Moreover, *the flexibility* of this standard enables the federal courts to

> promote judicial economy by permitting all reasonable related claims for relief by or against different parties to be tried in a single proceeding under the provisions of Rule 20 . . . In a similar vein language in a number of decisions suggests that the courts are inclined to find that the claims before them arose out of the same transaction or occurrence when the *likelihood* of *overlapping proof and duplication in testimony* indicates that separate trials would result in delay, inconvenience and added expense to the parties and to the courts.

See also *Moore's Federal Practice*, Vol. 3-A, 20.01-20.05. As regards the courts' interpretations of what constitutes a "transaction or occurrence or series of transactions or occurrences," plaintiff respectfully refers this Court to the following decisions:

a) In *U.S.* v. *Mississippi*, 380 U.S. 128, 85 SCT. 808 (1965) an action brought by the U.S. Attorney General on behalf of negro citizens of the state of Mississippi for discriminatory practices of the State Board of Elections Commissioners, the Supreme Court stated:

> "The District Court said that the complaint improperly attempted to hold the six county registrars jointly liable for what amounted to nothing more than individual torts committed by them separately with reference to separate applicants. For this reason apparently it would have held the venue improper as to the three registrars who lived outside the Southern District of Mississippi and a fourth who lived in a different division of the Southern District, and it would have ordered that each of the other two registrars be sued alone. But the complaint charged that the registrars had acted and were continuing to act as part of a state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote solely because of their color. On such an allegation the joinder of all the registrars as defendants in a single suit is authorized by Rule 20(a) of the Federal Rules of Civil Procedure, .....
>
> These registrars were alleged to be carrying on activities which were part of a series of transactions or occurrences the validity of which depended to a large extent upon

"question[s] of law or fact common to all of them." Since joinder of the registrars in one suit was proper, the argument that venue as to some of them was not properly laid is also without merit. 28 U.S.C. § 1392(a) 1393(b) (1958 ed.)."

b) Similarly, a statewide policy of conditioning state employment on the signing of a loyalty oath satisfied the transaction requirement of Rule 20. *Gilmore* v. *James*, 274 F Supp. 75 (D.C. Tex., 1967), affirmed per curiam in 389 U.S. 572, 88 SCT. 695. (1968).

c) In *Lucas* v. *Seagrave Corporation*, 277 F. Supp. 338 (D.C. Minn., 1967), an action by former employees on behalf of themselves and others similarly situated against the employer for accrued pension rights, in which the District Court determined that a class action was not maintainable because plaintiffs failed to demonstrate that the class was so numerous that joinder of all members was impracticable and defendant moved the court for an order dismissing or severing the claims on the grounds of misjoinder, the Court stated:

"The Court feels that the defendant's contentions on this question are without merit. Suffice it to say that the joinder of these plaintiffs would constitute at the very least permissive joinder under the Federal Rules because their various and several claims all arise out of the same transaction or occurrence or series of interralated transactions. The common questions of law and fact obviously exist and have arisen already in this action. Rule 20(a) Fed. Rules of Civil Procedure", at page 347.

d) One individual and three corporate plaintiffs joined in an action against a corporation and its corporate parents alleging breach of contract, fraud and antitrust violations. Defendants sought severance, alleging that each franchise agreement was negotiated and executed at different times and places and that its contractual performance with respect to each franchise was dependent upon a diverse set of variables, and that the fraudu-

lent representations were made separately to different plaintiffs. In denying severance, the Court said:

> "Notwithstanding defendant's contentions, the court is not prepared to conclude that the tests for joinder have not been met. The contract claims may will be predicated on different transactions or occurrences. The court cannot, however, discount the fact that the fraud and antitrust claims respectively allege acts of misrepresentation and conspiracy which directly affected all plaintiffs. It has been held that such conduct may constitute a single transaction or occurrence for purposes of Rule 20(a)." *Mesa Computer Utilities, Inc.* v. *Western Union Computer Utilities, Inc.*, 20 FR Serv. 2d 72 (D.C. Del., 1975)

e) In *Balkind* v. *Tre-Pak Development Corp.*, 17 FR Serv. 2d 77 (E.D. Pa., 1973), an action brought by individual purchasers of single family dwellings alleging identical misrepresentations concerning the materials to be utilized in the building of the homes, proper joinder of plaintiffs was found, the Court stating:

> "To permit a joinder, the subject matter of a complaint must relate to the same or series of transactions in which all the joined parties were engaged with the defendants. The rule relating to permissive joinder permits such joinder if there is any question of law or fact common to all defendants and *does not require that all facts adduced be common to all.* We are of the opinion that plaintiffs' claims do contain common questions of fact which satisfy the requirements of Rule 20(a). *We believe it would be burdensome to require* each *plaintiff to prove the alleged defect* in *separate and repetitious actions.*" (Emphases provided, Citations omitted.)

f) In *Smith* v. *North American Rockwell Corp..*, 50 F.R.D. 515 (1970), plaintiffs brought an action against defendant employer for alleged discrimination based on race and color. The company was organized into several separate divisions based on the type of work the unit was to perform. These divisions were further divided into departments. Plaintiffs belonged to different departments and divisions. The court

denied joinder to plaintiffs on the grounds that their claims did not arise out of the same transaction or occurrence:

> "In the instant case, neither of the two requirements for proper joinder under Rule 20(a) is present. First, the Complaint itself indicates that the transactions and occurrences on which it is founded are several, not joint; diverse, not the same. Second, even a cursory examination of the potential factual and legal issues here presented reveals that again there is no common ground among these plaintiffs.
>
> The dissimilarity in transactions and occurrences claimed to render the defendant liable appears in the allegations in Paragraph IV and VI of the Complaint and the supporting Record. For example, plaintiff Smith alleges that she was discriminatorily denied a promotion in Department 916. Plaintiff Rountree complains of an entirely different occurrence, that he was discriminatorily denied an opportunity to attend Blueprint School. Mr. Rountree was employed in an entirely different capacity than that of Mrs. Smith. Mr. Rountree was subject to a collective bargaining agreement; Mrs. Smith was not. Again, plaintiff Snoddy's complaint arises out of a separate and distinct transaction. He complains that he was discriminatorily denied a promotion in the Materials and Processes Laboratory. Finally, plaintiff Dews complains that she was discriminatorily denied a promotion in the accounting department.
>
> The general notion that there may have been denials of promotion in at least three cases cannot support joinder, where any purported denials of promotion would have been made by different supervisory personnel in different labor union and work environments, with respect to employees performing different types of work.
>
> Moreover, litigation of even any purported general policy of defendant, as it might affect each plaintiff here, would inevitably focus in detail on the separate work histories of each plaintiff. On its face it would be practically impossible to litigate fairly and efficiently in one lawsuit all of the factual and legal issues which the present plaintiffs seek to raise. It would be unnecessarily burdensome and time-consuming for all the parties to do so. The determination of facts and scope of testimony and defenses relating

thereto, with respect to one plaintiff would have little relevance to issues raised by another plaintiff. Instead, there would be an evaluation of the administration of varying company rules by different supervisory personnel in different departments all in the context of dissimilar job functions. Such assessment would require a most precise and careful weighing of individual motives within quite different contexts."

g) Finnally, in *Mosley* v. *General Motors Corp.*, 497 F.2d. 1330 (C.A. 8th, 1974), plaintiffs brought action alleging that employer, an automobile company, and the union, incurred in racial discrimination in their employment practices. The District Court denied joinder following the reasoning of *Smith* v. *North American Rockwell*, supra. The Court of Appeals reversed, stating:

"In ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, a case by case approach is generally pursued. 7 C. Wright, Federal Practice and Procedure 1653 at 270 (1972). No hard and fast rules have been established under the rule. However, construction of the terms "transaction or occurrence" as used in the context of Rule 13(a) counterclaims offers some guide to the application of this test. For the purposes of the latter rule,

"Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.

Accordingly, all "logically related" events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. The analogous interpretation of the terms as used in Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. *Absolute identity of all events is unnecessary.*

This construction accords with the result reached in United States v. Mississippi, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed. 2d 717 (1965) .....

Here too, then, the plaintiffs have asserted a right to relief arising out of the same transactions or occurrences. Each

> of the ten plaintiffs alleged that he had been injured by the same general policy of discrimination on the part of General Motors and the Union. Since a "state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote" was determined to arise out of the same series of transactions or occurrences, we conclude that a companywide policy purpotedly designed to discriminate against blacks in employment similarly arises out of the same series of transactions or occurrences. Thus the plaintiffs meet the first requisite for joinder under Rule 20(a)."
> (Emphasis supplied. Citations omitted)

The second requirement of Rule 20(a), that there be a question of law or fact common to all plaintiffs, does not require that every question of law or fact in the action be common among the parties. The rule permits party joinder as long as there is at least one common question of law or fact. The 1966 Ammendment to Rule 20(a), comments Moore, supra "is to make certain that Rule 20(a) does not limit joinder of claims and to extend the liberal policy of joining claims in pleadings to actions involving multiple parties."

This second requirement has been amply discussed in *Mosley* v. *General Motors Corp.*, supra:

> "The second requisite necessary to sustain a permissive joinder under the rule is that a question of law or fact common to all the parties will arise in the action. *The rule does not require that all questions of law and fact raised by the dispute be common.* Yet, neither does it establish any qualitative or quantitative test of commonality. For this reason, cases construing the parallel requirement under Federal Rule of Civil Procedure 23(a) provide a helpful framework for construction of the commonality required by Rule 20. In general, those cases that have focused on Rule 23(a)(2) *have given it a permissive application so that common questions have been found to exist in a wide range of context.* 7C. Wright, Federal Practice and Procedure § 1763 at 604 (1972). Specifically, with respect to employment discrimination cases under Title VII, courts have found that the discriminatory character of a defendant's conduct is basic to the class, and the fact that the individual class members may have suffered different ef-

fects from the alleged discrimination is immaterial for the purposes of the prerequisite. In this vein, one court has said:

[A]lthough the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.

The right to relief here depends on the ability to demonstrate that each of the plaintiffs was wronged by racially discriminatory policies on the part of the defendants General Motors and the Union. The discriminatory character of the defendants' conduct is thus basic to each plaintiff's recovery. The fact that each plaintiff may have suffered different effects from the alleged discrimination is immaterial for the purposes of determining the common question of law or fact. Thus, we conclude that the second requisite for joinder under Rule 20(a) is also met by the complaint."

Furthermore, it has been repeatedly decided that if complaints unsuccessfully plead a class suit, the court should retain the action if the plaintiffs can proceed solely on their own behalf, as permissively joined plaintiffs under Rule 20(a). *Harris* v. *Palm Springs Alpine Estates, Inc.*, 329 F2d. 909 (C.A. 9th, 1964); *Zachman* v. *Erurn*, 186 F. Supp. 681 (50 Tex., 1959); *Lucas* v. *Seagrave Corporation*, supra.

Plaintiff respectfully sustains that both the commentary and the decisions cited favor a joining of party plaintiffs in the case at bar.

First, this action purpoted to be a class suit under Rule 23(a) and 23(b) (1) and (2) of the F.R.C.I.P. The original plaintiff, Mr. Jose Ortiz Rivera, borught this action "on behalf of himself and the members of the class described in paragraph 20 of this complaint." (Par. 3 of the Complaint). On August 21, 1978 this Honorable Court entered an Order denying class certification on the ground that the complaint, as filed, did not comply with the numerosity requirement of Rule 23(a)(1). As stated above

it has repeteadly been decided that in such a case the court should retain the action, and consider plaintiffs permissively joined under Rule 20(a).

Second, plaintiff sustains that the complaint as filed, complied with Rule's 20(a) requirements of asserting a right to relief relating to or arising out of the same transaction or occurrence or series of transactions and occurrences and having a common question of law or fact:

Paragraph 4(a) adequately identifies co-defendant Carlos Chardon and alleges that "he has ultimate responsibility for the supervision and administration of the Department including determination of the employment status of the Plaintiff *and those in his class.*" (Emphasis supplied)

Paragraph 4(b) adequately identifies co-defendant Oscar Ramos and alleges that "he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the plaintiff *and those in his class.*" (Emphasis supplied)

Paragraph 13 alleges a state-wide discriminatory policy based on political reasons. It further alleges that all persons discriminated against occupied supervisory positions in the school system.

Paragraph 20 alleges the basis for the claims of all parties purpoted to be joined in this action by way of the Amended Complaint. It details the factual situation common to all of them.

Paragraph 21 further supports the statewide discriminatory policy alleged: "The members of the class reside and work throughout Puerto Rico . . ."

Paragraph 22 specifically alleges the questions of law and fact common to all of them.

Paragraph 23 specifically alleges political discrimination towards all of them.

The Complaint specifically seeks relief for Plaintiff *and all members of the class.* (pages 6 and 7).

Third, it cannot be sustained that the events which give rise to this claim are not logically related, since they all arise out of the same discriminatory policy of the Department of Education. Furthermore, all demotions complained of took place between May and July of 1977.

Fourth, certainly these claims, if individually pursued, would cause an overlapping of proof and a duplication of testimony, since the same persons are responsible for the demotions in all cases, and acted pursuant to the same discriminatory policy.

As the complaint alleges a state-wide policy of discrimination for political reasons, it satisfies the "same transaction or occurrence" requirement of Rule 20(a) as stated by the United States Supreme Court in *U.S.* v. *Mississippi*, supra, and the other decisions cited. Furthermore, the complaint also satisfies the common question of law or fact requirement, as stated in *Mosley* v. *General Motors Corp.*, supra. All persons seeking reddress from the defendant were subjects of its discriminatory policies because of their membership or political association with the PPD or political parties other than the NPP. As is stated in *Mosley*, "the discriminatory character of the defendant's conduct is basic to each plaintiff's recovery."

2. Rule 21 of the Federal Rules of Civil Procedure does not bar plaintiff's amended complaint. This Honorable Court stated no grounds for denying plaintiffs amended complaint, other than consigning that it did not comply with the requirements of Rule 20 or 21 of the Federal Rules Civil Procedure. A reading of Rule 20 made it rather easy for plaintiff to determine in what way this Court understood that it had not complied with its provisions as it clearly states two requirements that must be met for a permissive joinder of parties to proceed. The same cannot be said of Rule 21. The latter provides:

> "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the

> court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

The only part of the above cited rule which requires some kind of an action by a party in a suit, is the one that states that parties may be dropped or added by order of the court on motion of any party. Plaintiff therefore, assumes that this was the requirement that this Court referred to as not having been complied with by Plaintiff.

This being the case, plaintiff respectfully sustains that this requirement was complied with. Together with the Amended Complaint, Plaintiff filed a Motion entitled "Motion Under Rule 15 F.R.C.P. Requesting Leave of Court to Amend Complaint." It did not file as of right an amended complaint without seeking leave of court for the complaint had already been answered. In such motion Plaintiff stated:

> "5. That on account of the rulings of the Court, the best alternative left to the individual members of the class is to have the complaint amended in such manner that each of them becomes a co-plaintiff.
>
> 6. That on this date Plaintiffs are submitting an amended complaint, including as co-plaintiffs those members of the class who have requested to be represented by the undersigned attorneys in this case. Now wherefore, it is respectfully requested from this Honorable Court that it permit Plaintiff to file the attached Amended Complaint and enter the necessary order to that effect."

Even though said Motion made no reference to Rule 21 of the Federal Rules Civil Procedure, Plaintiff submits that the requirement of said rule was met, since he sought leave of court to add parties to this action by way of the amended complaint.

It is true that some courts have pointed out that the specific provisions of Rule 21 of the Federal Rules Civil Procedure govern the general provisions of Rule 15 of the Federal Rules Civil Procedure. Nevertheless, it has been repeteadly decided that the liberal approach towards amendments of Rule 15

should be highly persuasive in determinations under Rule 21. So, in *Kamininsky* v. *Abrams*, 41 FRD 168 (DC NY., 1966), in which plaintiff sought, prior to service of a responsive pleading, an order granting leave to join additional parties defendant in his derivative action against a corporation, the court said that while the specific provisions of Rule 21 governed the general provisions of Rule 15, *the liberal standards upon which amendments were to be granted when leave of the court was required under Rule 15 should guide the courts on Motions under Rule 21.* Accordingly, the court held that plaintiff should be permitted to add parties defendant. The same was held in *Holtzman* v. *Richardson*, 361 F. Supp. 544 (DC NY., 1973); *Gibbs* v. *Titelman*, 369 F. Supp. 38 (DC Pa., 1973); *Orloff* v. *Hayes*, 7 FRD 75 (DC NY., 1946).

Recent decisions, have been even more liberal in their approach to amendments holding that when no responsive pleading has been served, Rule 15(a), and not Rule 21, governs the amendment of complaints and no leave of court must be sought to add or drop parties by way of an amended complaint. *McLellan* v. *Mississippi Power & Light Co.*, 526 F2d. 870 (CA 5th. 1976); *Bransted* v. *Schmidt*, 324 F. Supp. 1232 (DC Wis., 1971); *Jones* v. *Electrodyne Co.*, 224 F. Supp. 599 (DC Mo., 1963); *City Bank* v. *Glenn Const. Corp.*, 68 FRD 511 (DC Hawaii, 1975); *U.S.* v. *Sinclair*, 347 F. Supp. 1129 (DC Del., 1972); *Healtherton* v. *Playboy*, 60 FRD 3721 (DC Cal., 1973).

Thus, Plaintiff respectfully sustains that he complied with Rule 21 of the Federal Rules Civil Procedure and that his motion to add parties should be granted, both under the spirit and the judicial interpretations of said Rule.

3. Plaintiff's motion for leave to file an amended complaint does not attempt to cicumvent the Court's prior ruling denying class certification.

> "The class action was an invention of equity . . . . . mothered by the practical necessity of providing a *procedural device* so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity

> from their equitable wrongs." *Montgomery Ward & Co.*, v. *Langer*, 168 F2d. 182-187 (CA 8th, 1948) (Emphasis supplied)

As previously stated this suit was commenced as a class action pursuant to Rule 23 of the Federal Rules Civil Procedure alleging that Plaintiff, together with more than a hundred other persons who were found in a similar situation, as described in paragraph 8 of the complaint, comprised a class meeting the requirements of said Rule. This Honorable Court held from the bench on August 21, 1978 that said individuals could not be certified as a class because they did not comply with the numerosity requirement of Rule 23(a). On September 7th, 1978, Plaintiff filed a "Motion for Reconsideration of Ruling" expressing and arguing why the class should be certified as previously prayed for. Said motion, was denied by this Honorable Court on September 28, 1978 and notified to Plaintiff on October 2, 1978.

Rule 23, as *Montgomery*, supra., clearly states, is a procedural device. Thus, it cannot defeat an individuals substantive rights. In Plaintiff's "Motion in Opposition to Defendants' Motion Opposing Plaintiff's Request to Amend Complaint", filed on November 9, 1978, Plaintiff respectfully stated its position concerning the effects of a denial of certification of a class suit:

> "It cannot be the purpose of Rule 23 of the Federal Rules Civil Procedure that individuals asserting a class action be barred from claiming their rights whenever a Court does not certify its petition for a class action."

As Rule 23 cannot defeat an individuals substantial rights, promptly after the denial by this Honorable Court of the Reconsideration of its ruling denying class certification, Plaintiff filed a Motion seeking leave of court to file an amended complaint, stating:

> "That on account of the ruling of the Court, the best alternative left to the individual members of the class is to have the complaint amended in such a manner that each of them becomes a co-plaintiff."

Plaintiffs understood that this was the best procedural mechanism available to further their rights, inasmuch as it avoided a multiplicity of suits, with the consequences of additional costs to Defendants, duplicity of proof and testimony and an overcrowding of the court's docket.

Precisely to protect the rights of purported class members to assert their claims individually, and to further the purposes of Rule 23 of the Federal Rules Civil Procedure, the courts have repeatedly decided that "the commencement of a class action tolls the statute of limitations as to all asserted members of a class who would have been parties had the suit been permitted to continue as a class action." *American Pipe and Construction Co.* v. *Utah*, 414 US 552, 554 (1974); *Barrett* v. *U.S. Civil Service Commission* 439 F. Supp. 216, 218 (DC DC, 1977); *McCarthy* v. *Kleindienst*, 562 F2d. 1269 (1977); *Goldstein* v. *Regal Crest*, 62 FRD 571 (Pa., 1974). In *American Pipe*, supra, well after the statute of limitations had run, the district court determined that the suit could not proceed as a class action because of the failure to satisfy the numerosity requirement. Eight days after this ruling the entities originally sought to be represented moved to intervene. The Supreme Court, reversing the district court held that such intervention was timely and appropriate. It stated:

> "A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure. Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable. In cases such as this one, where the determination to disallow the class action was made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court's docket, a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions. We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a

class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the action been permitted to continue as a class."

Plaintiff respectfully sustains that his Motion seeking leave of Court to file an amended complaint of October 2, 1978 was, thus, timely filed and a proper exercise of his substantial rights, not circumventing this Honorable Court's prior decision.

Finnally, Plaintiff respectfully refers this Court to his "Motion in Opposition to Defendant's Motion Opposing Plaintiff's Request to Amend Complaint" of November 9, 1978, pages 3 to 8, in which Plaintiff extensively discusses the procedural basis for granting permission to file an amended complaint in the case at bar.

NOW WHEREFORE, the Plaintiff requests from this Honorable Court the following:

1. That it reconsider its ruling of November 21, 1978 and that it order that the amendment complaint which was tendered be filed.

2. That it set an oral hearing for the discussion of this Motion.

Respectfully submitted.

In San Juan, Puerto Rico, this 29th day of November, 1978.

CANCIO, NADAL & RIVERA
G.P.O. Box 4966
San Juan, Puerto Rico 00936

/s/ By HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

**PROOF OF SERVICE**

I hereby certify that on this same date a copy of the foregoing Motion for Reconsideration and Memorandum of Law in Sup-

port Thereof was sent to: Francisco R. Agrait Llado, Esq., attorney for defendants, Department of Justice, P.O. Box 192, San Juan, Puerto Rico, 00902; Luis Miranda Correa, Esq., Ofic. 505 Asociacion de Maestros de Puerto Rico, Hato Rey, Puerto Rico; Luis Munoz Rivera, Esq., Cond. El Centro I, Of 607, Hato Rey, Puerto Rico and Luis E. Gandia Arguelles, Esq., Box 20343, Rio Piedras, Puerto Rico, 00928.

/s/ HARRY R. NADAL ARCELAY
Harry R. Nadal Arcelay

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

**CIVIL ACTION NO: 79-198**
**TRIAL BY JURY**

JUAN FUMERO SOTO,

*Plaintiff,*

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

*Defendants.*

**COMPLAINT**

TO THE HONORABLE COURT:

NOW COMES the Plaintiff and through his undersigned attorneys very respectfully claims, alleges, and requests as follows:

1. This is an action for declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. § 1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. § 249 (e), 18 L.P.R.A. 211, and 18 L.P.R.A. 214, *et seq.*

2. The jurisdiction of this Court is founded upon 28 U.S.C. § 1331 and 1343 (3) and (4). The amount in controversy exceeds $10,000.00 exclusive of interests and costs.

3. The Plaintiff in this action is a resident of Puerto Rico and employee of the Department of Public Education of the

Commonwealth of Puerto Rico (referred to hereinafter as "the Department").

4. The Defendants in this action are:

(a) Carlos Chardon, who is, and at all times herein relevant was, the Secretary of Public Education of Puerto Rico. In this capacity, he has ultimate responsibility for the supervision and administration of the Department, including determination of the employment status of the Plaintiff. Defendant Chardon is sued in his individual and official capacities.

(b) Oscar Ramos, who is, and at all time herein relevant was, the Assistant Secretary of Public Education in Charge of Personnel of Puerto Rico. In this capacity, he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the Plaintiff. Defendant Ramos is sued in his individual and official capacities.

5. On November 2, 1976, Puerto Rico held a gubernatorial election. In this election, the candidate of the Popular Democratic Party (referred to hereinafter as the "PDP") was incumbent Governor Rafael Hernadez Colon. Former Governor Hernandez Colon was defeated by Governor Carlos Romero Barcelo, who was the candidate of the New Progressive Party (referred to hereinafter as the "NPP"). Governor Romero Barcelo took office on January 2, 1977.

6. Governor Romero Barcelo appointed Mr. Herman Sulsona as Secretary of Public Education, and Sulsona, in turn, appointed defendant Ramos as Assistant Secretary of Public Education in Charge of Personnel. Both Sulsona and Defendant Ramos assumed their positions on or about January 3, 1977. Both Sulsona and Defendant Ramos are members and active in the affairs of the NPP.

7. On or about March 13, 1977, Mr. Sulsona resigned as Secretary of Public Education, and Governor Romero Barcelo appointed Defendant Chardon as his successor. Defendant Chardon assumed the position of Secretary of Public Educa-

tion on or about March 31, 1977. Defendant Chardon is a member and active in the affairs of the NPP.

8. The Plaintiff mentioned in the caption of this complaint was employed by the Department of Education during the 1976-77 school year, without permanent status; in a locally and/or federally funded position as General Supervisor I - School and Community Relations Program.

He had been promoted to such position, on the basis of his merits, from a lower position in which he did have and enjoy permanent status within the meaning of 18 L.P.R.A. 211 and was protected by 18 L.P.R.A. 214, *et seq.* Plaintiff was demoted to his previous position, such demotion to take effect at the beginning of the 1977-78 school year. This last action on the part of Defendants also deprived Plaintiff of his constitutional rights and, in particular, constituted a violation of his rights under the First and Fourteenth Amendments of the Constitution of the United States. The aforementioned position in which Plaintiff was employed during the 1976-77 school year involved functions of school administration. It was not a policy-making position, and Plaintiff did not participate in the formulation of policies relating to the operation of the Department. He had to follow policies formulated at the Department's level.

9. Plaintiff is, and at all times herein relevant was, member and active in the affairs of the PDP or political parties other than the NPP. On information and belief, the defendants are, and at all times herein relevant were, aware of Plaintiff's political association with its party, even if they did not know him personally.

10. On or about June, 1977, Plaintiff received a letter, signed by Julio Cintron Lopez, Director of the Personnel Division of the Department, ____ removing him from his position, effective at the beginning of the 1977-78 school year, and reassigning him to his previous position in the Department. A copy of the aforesaid letter is attached to this complaint as *Attachment A*, and made a part hereof. Plaintiff's permanent

position, to which he was assigned as per the corresponding letter, is lower in rank and compensation than the non permanent he held until them, and, therefore, his reassignment constitutes a demotion. On or about June 1977, Plaintiff wrote a letter to Defendant Chardon, in which he objects his removal from his position and announces that he is taking the necessary steps towards the corresponding legal action. A copy of such letter is attached to this complaint as *Attachment B*, and made a part hereof.

11. The letter received by Plaintiff sets forth no reason for his removal from the non permanent position he held and there was no legitimate reason for such removal. No notice, hearing, nor any other form of due process was awarded to plaintiff.

12. At the beginning of the 1977-78 school year, Plaintiff was actually removed from the non permanent position in which he was employed during the 1976-77 school year, and demoted to his permanent position in the Department. As of the date of this complaint, he is serving in the latter position.

13. Substantially all of the persons who were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians and who were members and/or active in the affairs of the PDP or political parties other than the NPP were removed from their positions at the end of the 1976-77 school year or the beginning of the 1977-78 school year; and substantially all of the persons who were employed during the 1976-77 school year without permanent status in the aforesaid positions and who were not members and/or active in the affairs of the PDP or political parties other than the NPP were not removed.

14. The supervisory position in which Plaintiff was employed during the 1976-77 school year has been filled for the 1977-78 school year.

15. Plaintiff alleges that the Defendants removed him from his supervisory position at the beginning of the 1977-78 school year and demoted him to his previous position solely because of his political association with the PDP or parties other than the NPP, and that he would not have been removed and demoted but for such association.

16. Plaintiff alleges that the aforesaid action by the Defendants constitutes a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. He also alleges that said action is contrary to and contravenes the rights acquired by him under the provisions of 18 L.P.R.A. 214 *et seq.* He further avers that as career publi servant (empleado publico de carrera) he had the legitimate expectation to remain in the position to which he had been promoted (and from which he was demoted by Defendants) and that he could not be removed or demoted from that position except for cause.

17. The Defendants knew, or reasonably should have known, that removing Plaintiff from his supervisory position and demoting him to his previous position because of his political association with the PDP or parties other than the NPP was a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. The Defendants acted maliciously, willfully, and in wanton and reckless disregard of Plaintiff's constitutional rights when they took the aforesaid action, in violation of Plaintiff's civil rights, as provided in Section 1983, 42 U.S.C.A.

18. The action of the Defendant in removing Plaintiff as stated above constituted a violation of his rights under the First and Fourteenth Amendments to the United States Constitution; constituted a violation of his civil rights as provided in Section 1983, 42 U.S.C.A., and constituted a violation of his rights under the laws of Puerto Rico, specifically (in addition to § 214 mentioned in paragraph 16), under Section 249 (a) and (e), of Title 18, L.P.R.A.

WHEREFORE, the Plaintiff respectfully requests from this Court that it:

1. Declare that the Defendants:

   (a) in removing the Plaintiff from the position in which he was employed during the 1976-77 school year, violated his rights under the First and Fourteenth Amendments to the United States Consitution and under Section 1983 of 42 U.S.C.A.; and also violated his rights under Sections 249 (a) and (e) and 214, *et seq.* of Title 18 L.P.R.A.

2. Order that Defendants:

   (a) reinstate Plaintiff to the position in which he was employed during the 1976-77 school year and from which he was dismissed or demoted in violation of his rights under the statutes mentioned in the complaint.

   (b) pay to Plaintiff full back pay for the period from the date of his removal or demotion from the positions in which he was employed during the 1976-77 school year until the date of his reinstatement to that or other substantially equivalent position, including prejudment interests, less any pay received by him from the Department during the period in question.

   (c) pay to the Plaintiff all damages proximately resulting from defendants' wrongful actions;

   (d) pay to the Plaintiff punitive damages in the amount of $50,000.00; and

   (e) be enjoined permanently from removing any person from a non-policy making position with the Department because of such person's political association.

3. Award to the Plaintiff:

   (a) costs and reasonable attorneys' fees; and

   (b) such other and further relief as this Court shall find to be just and proper.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 2nd. day of January, 1979.

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/s/ BY: Ana Matilde Nin Torregrosa
ANA MATILDE NIN TORREGROSA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 79-198

JUAN FUMERO SOTO,

*Plaintiff,*

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

*Defendants.*

## ANSWER TO THE COMPLAINT

TO THE HONORABLE COURT:

Appearing through their undersigned attorneys and without submitting to the jurisdiction of this Honorable Court, defendants Carlos Chardon, Secretary of Education of the Commonwealth of Puerto Rico, and Oscar Ramos, Assistant Secretary In Charge of Personnel of the Department of Education of the Commonwealth of Puerto Rico, submit the following answer to the complaint:

### GENERAL ALLEGATIONS

1. The Complaint fails to state a claim against these appearing parties upon which any relief may be granted by this Honorable Court.

2. All conclusions of law alleged in the Complaint are disputed insofar as applicable to the factual allegations therein.

3. All factual allegations contained in the Complaint, except those specifically admitted below and as therein qualified, are denied.

**SPECIFIC ALLEGATIONS**

4. Defendants admit paragraphs 4a and b with the clarification that Mr. Ramos' official title is Assistant Secretary of Public Education in Charge of Personnel; Par. 5 & 14 admitted.

5. Defendants admit the following paragraphs of the Complaint in part, and deny them in part:

Paragraph 3 - Defendants admit that plaintiff is an employee of the Department of Education of the Commonwealth of Puerto Rico.

Paragraph 6 - The first two sentences are admitted, the last sentence is denied.

Paragraph 7 - It is admitted, except for the last sentence which is denied; Mr. Carlos Chardon is but a member of Governor Romero Barcelo's cabinet, the Secretary of Public Education.

Paragraph 10 - It is admitted that Mr. Julio Cintron Lopez sent a letter to plaintiff reinstating him to his permanent position. It is also admitted that on June 30, 1977, plaintiff wrote a letter to defendant Secretary Chardon, expressing his objection as to the decision announced to him in Mr. Cintron Lopez's letter to him. The rest of the allegations contained in this paragraph are denied.

Paragraph 12 - Denied as stated in the Complaint. At the begining of the school year 1977-78, plaintiff was reinstated to his permanent position; a position in which he is presently serving.

Paragraph 8 - It is accepted that plaintiff was employed by the Department of Education during the 1976-77 school year, in a non permanent position as General Supervisor I - School

and Community Relations Program. As of April 4, 1978 he was reassigned to a position of Director Second Unit IV. The rest of the allegation is denied.

6. Paragraph 9 is Denied For Lack of Information and Belief.

7. The following paragraphs are Denied: 1, 2, 11, 13, 15, 16, 17, 18.

**AFFIRMATIVE DEFENSES**

1. The complaint fails to state an actual case or controversy between plaintiff and defendants cognizable in this Court.

2. The complaint fails to state adequate statutory grounds to support the jurisdictional grounds alleged therein.

3. The complaint fails to state specific facts adequate to support the jurisdictional grounds alleged therein.

4. The complaint fails to state specific acts of the defendants which amount to a deprivation of any of plaintiff's federally protected rights.

5. The complaint fails to state a federal cause of action against defendants upon which any relief may be granted by this Honorable Court.

6. At all times pertinent to this complaint, the defendants have acted according to law and in the good faith performance of their duties as employees of the Commonwealth of Puerto Rico.

7. The controversy is limited to the interpretation of Commonwealth law and presents no federal questions.

8. Plaintiffs have not exhausted the administrative remedies available to them under Commonwealth Law and therefore cannot claim lack of due process.

9. Plaintiff has not exhausted the judicial remedies available to them in the Commonwealth Courts and this Honorable

Court should therefore abstain from entertaining the controversy prior to such exhaustion.

10. Whether or not plaintiff had any right subject to due process protection of the Federal Constitution hinges upon the interpretation of Commonwealth law which presents no federal question.

11. The complaint fails to state facts showing that the circumstances of this case warrant the intervention of this Honorable Court in the administrative proceedings of the system of Courts of Commonwealth of Puerto Rico.

12. The complaint fails to state specific facts showing any acts of defendants Carlos Chardon, Secretary of Public Education of the Commonwealth of Puerto Rico and Oscar Ramos, Assistant Secretary of Public Education in Charge of Personnel, amounting to a deprivation of plaintiff's federally protected or guaranteed rights.

13. Any damage, if any, suffered by plaintiff as a result of the acts complained of were the result in full or in part of plaintiff's actions and failure to act.

14. The doctrine of primary jurisdiction applies to this case and thus plaintiffs must first pursue the administrative remedy available to them.

15. The complaint is barred by the statute of limitations.

WHEREFORE, these appearing defendants respectfully pray from this Honorable Court, the Complaint herein be dismissed, taxing plaintiff with defendants costs, expenses and attorney's fees and such other relief as this Honorable Court may deem just and proper.

Respectfully submitted in San Juan, Puerto Rico, this 26th day of March, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 79-198

JUAN FUMERO SOTO,

*Plaintiff,*

v.

CARLOS CHARDON, *et al.*,

*Defendants.*

ORDER

Defendants' motion for judgment notwithstanding the jury's verdict has required a detailed examination of the jurisprudence regarding qualified immunity of state officials from damages. For the reasons stated in the following Memorandum, the defendants' motion for judgment notwithstanding the verdict is denied.

The Court exercises its equitable power to order that the Commonwealth of Puerto Rico Department of Education reinstate all those plaintiffs who have remained in their employ to the respective positions each held, or its functional equivalent, at the time of their demotion.[1] This reinstatement may be accomplished in accordance with the dictates of sound administrative practices. Therefore, reinstatement may be delayed until the end of the present school year, but not later than the start of the next school year.

The Department is further ordered to pay plaintiffs' full back pay in the amount to be computed in each case,[2] and to take all other affirmative relief necessary to make the plaintiffs whole. Any delay in reinstatement pursuant to the administrative practices described above will not vitiate the requirement that back pay be awarded up to and including the time reinstatement takes place. Those teachers who chose to leave the Department will be allowed back pay calculated for the period

they were in reduced positions until they voluntarily terminated their teaching positions.

However, as a matter of law and in light of the jury's factual finding that the defendants did not have a malicious intent to deprive plaintiffs of their rights, the relief herein granted exhausts the remedies and damages available to plaintiffs. Despite the bifurcation of this trial into liability and damage elements, the jury's findings vitiates the need to hold damage trials.

With respect to any claim for which no statute of limitation defense was pending, final judgment will enter pursuant to Fed. R. Civ. P. 54(b), once the filing requirements of Notes 1 and 2 shall have been complied with and approved by the Court.

The Court will consider a petition for plaintiff's attorney's fees, along with the appropriate briefing and documentation of time involved when final judgment has been entered according to the terms of this Order.

**Notes**

(1) In approximately 10-15 of these cases, defendants have asserted a defense that the claims were barred by the applicable statute of limitations. This defense was specifically reserved when these cases were consolidated. This issue is presently before the Court of Appeals for the First Circuit in related "Chardon" teacher discrimination cases. This Court will await that decision before dismissing the complaints or entering judgment on behalf of the individual plaintiffs therein, pursuant to this Court's Memorandum Order of January 28, 1981.

The parties are directed to meet at the earliest possible time for the purpose of providing this Court with a list of those cases where judgment can be immediately entered in accordance with this Order, and those which would be controlled by the ruling of the Court of Appeals. This list shall be filed with the

Court within 30 days of the filing of this Order. If the parties are not in agreement on a particular case, they will immediately note the basis of their disagreement, specifying the date the demotion letter was sent, the date received, and the date the particular complaint was filed. The Court will consider any supplemental information the parties deem appropriate.

(2) The calculation of the back pay amount should not require the intervention of the Court. The parties are directed to meet and calculate the amount owed each plaintiff. A list setting forth the amount due each plaintiff must be filed within 30 days of the filing of this Order. Judgment will then be entered accordingly.

SO ORDERED.

ENTER: May 7, 1981

/s/ ROBERT A. GRANT
Robert A. Grant
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

**CIVIL NO. 79-198**

JUAN FUMERO SOTO,

*Plaintiff,*

v.

CARLOS CHARDON, *et al.*,

*Defendants.*

**MEMORANDUM**

Fifty-five school teachers and administrators, plaintiffs in these 55 consolidated cases, brought individual suits charging that they were unlawfully discriminated against and demoted due to their association with and membership in the Popular Democratic Party (PDP), a political party in the Commonwealth. Each plaintiff's theory is that Carlos A. Chardon, then Secretary of Education for the Commonwealth, and his Assistant Secretary for Personnel, Oscar Ramos, members of the governing New Progressive Party, unlawfully demoted each of the plaintiffs at dates ranging from May till June of 1977, in violation of the First and Fourteenth amendments, 42 U.S.C. § 1983, and various Puerto Rican statutes. 18 L.P.R.A. §§ 249(e),[3] 211 and 214 *et seq.* Actions under Puerto Rican law come within both § 1983 and its jurisdictional predicate, 28 U.S.C. § 1343(3). *Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572 (1976). It is impermissible to discriminate in the work place based upon a person's political affiliations. *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Branti* v. *Finkel*, 445

[3] 18 L.P.R.A. § 249(e) prohibits school officials from making personnel changes based on an employee's political affiliation.

U.S. 507 (1980); *Perry* v. *Sindermann*, 408 U.S. 593 (1972).[4] These suits were brought against Chardon and Ramos in their individual and official capacities.[5]

Before trial, the individual plaintiffs, each represented by the same group of attorneys, indicated that a large portion of their proof at trial would consist of establishing a pattern of unlawful discrimination, requiring repetitious testimony from a number of plaintiffs. Inasmuch as the factual and legal issues, the attorneys and the parties were common to all these cases, these suits were ordered consolidated pursuant to Fed. R. Civ. P. 42(a). Subsequently other judges in this district transferred a number of "Chardon" cases for inclusion in the consolidated trial. This trial was bifurcated, and was to consider only the liability issues. Fed. R. Civ. P. 42(b). *See* Court Order, January, 1981. In essence, the jury's findings on the issue of liability in this captioned case was made binding upon the parties in all of the consolidated cases. The damages issues were not consolidated.

Each of the plaintiffs herein was demoted from the position of school principal or other supervisory position in which he or she did not have tenure. Upon demotion as ordered by the Department he or she was returned to the tenured position as school teacher or to lesser administrative rankings, as previously occupied. No one was discharged. While the complaints of most teachers requested declaratory relief, reinstatement, back pay and punitive damages, approximately ten to fifteen suits were filed by teachers who chose to leave the

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[4] The affirmative defense that the plaintiffs were confidential or policymaking employees, and hence, not protected from discharge, was not raised as an issue in this case.

[5] Since Chardon resigned as Secretary before trial, the new Secretary of Education is automatically substituted in her official capacity for Chardon, Fed. R. Civ. P. 25(d). The caption has not been formally changed to reflect this. Chardon, of course, remains a defendant in his individual capacity.

Department during the pendency of these lawsuits. These ex-teachers were no longer interested in the equitable relief of reinstatement, but in turn sought a more substantial monetary judgment than those who remained employees of the Department.

These cases were tried to a jury. With the agreement of counsel, the following instruction was given pertaining to the defendants' affirmative defense that they had acted in good faith while demoting each plaintiff, and thus were protected by a qualified official immunity;

> We have made reference to the affirmative defense of good faith and a qualified immunity.
>
> The jury is instructed that the defendants were each public officials of the Commonwealth of Puerto Rico. They were acting in their official capacity at all times pertinent to this case.
>
> And, as such, they did enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary.
>
> It is the existence of reasonable grounds for the belief formed and acted upon at the time, and in light of all the circumstances, coupled with a good faith belief, that affords a basis for a qualified immunity of State officials for acts that are performed in the course of their official conduct.[6]
>
> The Commonwealth officials who are defendants in this case are not immune from liability for actions taken under Section 1983 if that official knew or should have known that the action taken within his sphere of official responsibility would violate the Constitutional or legal rights of the teachers affected, *or if the official took the action with the malicious intention of causing a deprivation of Constitutional or legal rights or other injury to the teachers.*[7] (emphasis added).

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[6] This paragraph is taken from *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974).

[7] This paragraph is taken from *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975).

The jury returned a verdict for the plaintiff and against each defendant. The Court then defined malicious intent,[8] and requested that the jurors return to their deliberations to answer the following interrogatory:

> Following a finding by the jury that the defendants Carlos Chardon and Oscar Ramos, individually and in their official capacities are liable to the plaintiffs in this consolidated cause, the jury is now instructed to deliberate further for the sole purpose of answering this question: Did the defendant Carlos Chardon *have a malicious intent to deprive plaintiffs of their constitutional or other rights?*
>
> And a similar question with respect to the other defendant: Did the defendant Oscar Ramos *have a malicious intent to deprive the plaintiffs of their constitutional or other rights?* (emphasis added).

The jurors answered "No" with respect to each defendant. No objection was made regarding this interrogatory. It is noted here that the language in the prior charge and the special interrogatory is identical. The Court now must give effect, if possible, to both the general verdict for plaintiff, and the interrogatory answer that defendants lacked malicious intent.

(I) *Punitive Damages*

The Supreme Court has construed 42 U.S.C. § 1983 to allow an award for compensatory damages. It has not, as yet, definitively ruled as to whether punitive damages are also available:

> To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional

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[8] I am going to read to you a definition from a couple of cases as to what that constitutes.

"Malice is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury or under circumstances that the law will imply an evil intent."

And the other, from the other case, I read as follows: "Maliciousness does not necessarily mean actual malice or ill-will, but intentional doing of a wrongful act without legal or social justification.

> rights, *there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.* See *Imbler* v. *Pachtman*, 424 US, at 442 (White, J., concurring in judgment).

*Carey* v. *Piphus*, 435 U.S. 247, 256-57 (1978) (emphasis added) (footnote omitted). The footnote following this holding further explained the Court's position:

> *This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights.* See, *e.g.*, *Silver* v. *Cormier*, 529 F.2d 161, 163-164 (CA10 1976); *Stengel* v. *Belcher*, 522 F.2d 438, 444 n.4 (CA6 1975), cert. dismissed, 429 U.S. 118 (1976); *Spence* v. *Staras*, 507 F.2d 554, 558 (CA7 1974); *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (CA1), cert. denied, 393 U.S. 940 (1968); *Mansell* v. *Saunders*, 372 F.2d 573, 576 (CA5 1967); *Basista* v. *Weir*, 340 F.2d 74, 84-88 (CA3 1965). Although we imply no approval or disapproval of any of these cases, we note that there is no basis for such an award in this case. *The District Court specifically found that petitioners did not act with a malicious intention to deprive respondents of their rights or to do them other injury, see n.6, supra, and the Court of Appeals approved only the award of "non-punitive" damages, 545 F.2d 30, 31 (1976).*
>
> We also note that the potential liability of § 1983 defendants for attorney's fees, see Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988, provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights. See also 18 U.S.C. § 242, the criminal counterpart of § 1983.

*Id.* at 257 n.11 (emphasis added).

The Court of Appeals for the First Circuit has held that punitive damages are available against § 1983 defendants "when there are aggravating circumstances." *Fact Concerts, Inc.* v. *City of Newport*, 626 F.2d 1060, 1067 (1st Cir. 1980), citing *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (bad faith) and *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968) (unwarranted in-

vasion of privacy). In *Rosado*, *supra*, it was stated: "[I]ntentional interference with constitutional rights, standing alone, is not enough; there must also be 'aggravating circumstances.' " 562 F.2d at 121. Citing the standards used by other circuits, the *Rosado* court continued: "and the Third Circuit has described the standard as 'malicious and wanton disregard' of a plaintiff's rights." *Id.* (citation omitted).

The jury's answer to the interrogatories in this case ended any claim for punitive damages. As the plaintiff's attorneys acknowledged, the award of punitive damages is a decision for the trier of fact. Although the parties failed to raise the issue, any decision granting or denying punitive damages must include an assessment of the conduct in question, evidentiary inferences and evaluations pertaining to motive and knowledge. *Alicea Rosado* v. *Garcia Santiago*, *supra*. *See also Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970). *See also* Annot., 14 A.L.R. Fed. 608 (1970). It became apparent that failure to have questioned this liability jury regarding the defendants' intent would have required a full repetition of the liability trial testimony in any subsequent trial on the issue of punitive damages. However, based upon the jury's findings, no punitive damages can now be awarded. With this in mind, the Court will now address defendants' contention that the jury's interrogatory answers unwittingly opened the door to an inconsistent verdict.

(II) *The Motion For Judgment Notwithstanding The Verdict*

Defendants moved for a directed verdict at the close of the evidence offered by plaintiff, and again at the close of defendants' evidence on the official immunity defense. The Court reserved its decision upon that motion. After the jury's answer that defendants lacked a malicious intent, defendants moved for judgment notwithstanding the verdict. Defendants contend that these answers entitle them to prevail in their affirmative defense of qualified immunity, and that the general liability verdict is contradicted by the interrogatory answers to the

effect that defendants had no malicious intent. In the alternative, they claim as a matter of law that the answers bar any subsequent claim for damages from the individual defendants.

The Court is not persuaded in the first instance that the findings are contradictory. To that extent, judgment notwithstanding the verdict is denied. The Court is persuaded, however, that the jury's answers do preclude the award of damages against the defendants in their individual capacity based upon an independent question of law.

The standard for ruling on a motion for judgment notwithstanding the verdict is the same as the standard for a directed verdict motion. The district court is to review the evidence in the light most favorable to the prevailing party, giving the plaintiff here the benefit of all the factual inferences that the evidence fairly supports without weighing the credibility of the witnesses. Fed. R. Civ. P. 50(b). *Fact Concerts, Inc.* v. *City of Newport, supra,* 626 F.2d at 1064. *See also Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 696 (1962); *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943). Reviewing the testimony presented in this case by that standard, the Court cannot conclude that the evidence presented was insufficient to permit a rational jury from reaching both the verdict of liability and finding on the lack of malicious intent. Therefore, under the applicable standard the Court must effectuate both the general verdict and interrogatory answers. At this point, however, the Court must state its view of the evidence that was presented. The evidence of political discrimination and the defendants' personal involvement in the demotions was not overwhelming. Candidly, a reasonable man could have found the plaintiff's proof unconvincing. The Court will not invade the jury's province to substitute its credibility determinations and reach an alternative judgment. But in this case the jury had two bites of the apple so to speak, and both must be harmonized by the Court, if possible, under a fair reading of the answers. Fed. R. Civ. P. 49(b). *See Gallick* v. *Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 119 (1963).

Fed. R. Civ. P. 49 and the cases which construe it indicate that, "[W]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). Although that case discussed Rule 49(a), while this case arises under Rule 49(b), the principles expressed remain equally valid. In fact, if the difference between the general verdict and interrogatory answers is perceived as possibly inconsistent, the general admonition is that the answers to special interrogatories should control, rather than the general verdict.[9] The power to enter judgment on findings inconsistent with the general verdict "is a constitutional one and does not violate the Seventh Amendment since the jury's findings of fact are not being reexamined but, as a reasonable regulation of practice, their more specific findings of fact are allowed to control their general conclusion embodied in the general verdict." 5A Moore's Federal Practice ¶ 49.04; Wright and Miller, Federal Practice and Procedure: Civil § 2513. In summary, while harmonizing the answers the more general liability verdict must give way to the more specific lack of intent finding. This principle will be borne in mind when the qualified immunity issues are considered.

(III) *Qualified Immunity From Damages*

A. *Liability*

The nature of the qualified immunity defense at common law and in § 1983 cases has been judicially established commencing

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[9] *Blackwell* v. *Cities Service Oil Co.*, 532 F.2d 1006 (5th Cir. 1976); *Nimnicht* v. *Dick Evans, Inc.*, 477 F.2d 133 (5th Cir. 1973); *Elliot* v. *Watkins Trucking Co.*, 406 F.2d 90, 92 (7th Cir. 1969); *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379, 406-07 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); *United States* v. *City of Jacksonville, Arkansas*, 257 F.2d 330 (8th Cir. 1958); *Golden North Airways, Inc.* v. *Tanana Publishing Co.*, 218 F.2d 612 (9th Cir. 1954).

with *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).[10] In *Scheuer*, the Governor of Ohio, the University President and National Guard officers involved in the Kent State University killings claimed absolute official immunity from damages under § 1983. This discussion is of particular significance in the case before us inasmuch as *Scheuer* addresses the scope of immunity available to state executive officials occupying positions of authority analogous to those held by the defendants here. The Court began by noting the reasons why officials had been held immune from suits for personal damages at common law:

> The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the "King can do no wrong"—did not protect all government officers from *personal* liability, *the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability*. This official immunity apparently rested, in its genesis, on two mutually dependent rationales: *(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.*

416 U.S. at 239-40 (emphasis added) (footnotes omitted).

In holding that a qualified official immunity exists, Justice Harlan's prior admonitions on this subject were restated, followed by the Court's holding.

> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the

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[10] The Court has made clear that immunities under § 1983 are to be read in harmony with the general principles of tort immunities and defenses. *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976). *See also Tenney* v. *Brandhove*, 341 U.S. 367 (1951).

> privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas*, *supra*, at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. 360 U.S., at 573-574."
>
> *These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.* It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

*Id.* at 247-48 (emphasis added).

In this case, plaintiff concedes that a qualified official immunity clothed both Chardon and Ramos inasmuch as the Commonwealth's Secretary of Education is given practically limitless discretionary powers in the personnel area. 18 L.P.R.A. § 211 *et seq.* While this discretionary power cannot be used to ratify political discrimination in promotion and demotion policies, the *Scheuer* Court apparently contemplated a de facto "sliding scale" of qualified immunity protection for public officials. In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Court again confirmed that like the state cabinet officials and state governor in *Scheuer*, the federal cabinet appointee in *Butz* deserved the highest level of protection from suits against him, *i.e.*, below the level of absolute immunity. Implicitly, this requires a heightened degree of knowledge, personal participation and malice by the higher executive offi-

cial in an allegedly discriminatory action. *See also Williams* v. *Anderson*, 562 F.2d 1081, 1101 (8th Cir. 1977).

*Scheuer* was followed by *Wood* v. *Strickland*, 420 U.S. 308 (1975), which examined the scope of immunity for members of a school board in disciplinary proceedings. Essentially, the Court again sought to steer between the two weighty and competing concerns in this area—making public officials responsible for violating citizen's constitutional rights, without emasculating the officials' power, and will, to make difficult or unpleasant decisions when necessary. *See also Butz* v. *Economou*, *supra*, at 503.

Comparing the *Scheuer* defendants with the *Wood* officials, the latter occupied much lower executive positions. The *Scheuer* analysis would indicate that a lesser degree of qualified immunity would be sufficient to protect the *Wood* defendants. The "variation" in the scope of the immunity accorded the officials in *Scheuer* was at a low ebb in *Wood* v. *Strickland* for this reason. In *Wood* the Court held:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 *if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional or other injury to the student.*

*Id.* at 322 (emphasis added).

In the present case, the jury was instructed, without objection in accord with this dual Wood standard. Parsing this standard, the "should have known" language can be characterized as a negligence standard. It is an objective measure of the defendants' conduct, although the "knew" portion is subjective in the sense that it required an examination of the defendants' state of mind. Via the conjunctive "or" the Court connected the second branch to the *Wood* standard, a subjective intent test which inquires whether the official maliciously intended to injure the plaintiff. Based upon the jury's answer to the special

interrogatory, there was no such impermissible intent in this case. Therefore, the "knew or should have known" standard is the branch plaintiffs must depend upon here.

The compelling policy dilemma of the immunity decisions is the need to balance the plaintiff's compensation for injuries with the need to protect the decision making process. *Barr* v. *Mateo*, 360 U.S. 564, 565 (1959). To complicate any analysis under the *Wood* holding, however, the Court has left further instructions which must be integrated with the liability analysis.

B. *Damages*

As noted in Wood:

> *Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties.* School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations. Denying any measure of immunity in these circumstances "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray*, *supra*, 386 U.S., at 554, 87 S.Ct., at 1218. *The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.* The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.

*Id.* at 319-20 (emphasis added) (footnote omitted).

In addition to the *Scheuer* and *Butz* "sliding scale" of immunity, and the *Wood* liability standard, the Court has indicated

here that merely satisfying the *Wood liability test* may not be sufficient to allow an award of *damages*. Once liability exists, damage awards still depend to some degree on the subjective determination of whether the official acted in good faith, *e.g.*, whether the "mistaken" constitutional deprivation is reasonable or unreasonable. Rather than only one standard by which to provide a readily discernible litmus test to judge official immunity, it is apparent from the Court's opinion that the analysis regarding damages is more complicated. An official could make a "reasonable" mistake protected by official immunity, a mistake which might otherwise constitute an actionable violation of 42 U.S.C. § 1983.

The Court concluded *Wood* analysis by making the following admonition regarding damages:

> *A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that this action cannot reasonably be characterized as being in good faith.*

*Id.* at 322 (emphasis added).

Before evaluating the verdict and interrogatory answers in light of the *Wood* damage holdings, it appears that integrating these damage teachings with the liability standards yields a presumably unintended conflict. Under § 1983 and the *Wood* liability standard of "knew or should have known," liability can exist for non-deliberate conduct. However, in the absence of an impermissible motivation, or deliberate disregard for citizen's rights, damages should not be awarded. The conflict does not stem from faulty analysis, but is a product of the requirement that a balance be struck which protects both citizens and officials. In effect, qualified immunity protects officials like Chardon and Ramos from damages even when they objectively should have known that violations of constitutional rights were occurring, but where they took these actions in the absence of malicious or bad motivation. While a specific answer to the question of whether the mistake was "reasonable" or "unreasonable" would clearly answer this concern, no jury finding exists on that question.

Although the Supreme Court has specifically limited the *Wood* v. *Strickland* decision to the context of school discipline, *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), these damage teachings have been expanded upon and utilized in other areas. Rather than slavishly utilizing the *Wood* v. *Strickland* decision, these cases indicate that the standard for awarding damages against officials is higher than mere negligence on the part of the official involved.[11]

The appropriate test, drawn from the Supreme Court's opinions, was stated by the Seventh Circuit in *Thomas* v. *Pate*, 516 F.2d 889, 891 n.2 (7th Cir.), *cert. denied*, 423 U.S. 877 (1975), and again restated as the holding of *Bonner* v. *Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932 (1978) (footnote omitted):

> [A] plaintiff must prove that the defendant has acted within the sphere of his official responsibility, "with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff] or "with such disregard to the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

Neither test is satisfied here. First, the jury finding that there was no malicious intent precludes the Court from finding the officials acted out of an impermissible motivation. Nor does the evidence presented at trial support such a proposition.

Second, plaintiff claims that defendants objectively acted with a deliberate disregard of his established constitutional rights, *e.g.*, the employee's right not to be discharged for his

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[11] The Supreme Court has left open the question of whether negligence on the part of state officials is sufficient to constitute a constitutional violation. *See Baker* v. *McCollan*, 443 U.S. 137 (1979). The cases collected in *Bonner* v. *Coughlin*, 545 F.2d 565, 568 n.8 (7th Cir. 1976) (en banc), indicate the majority view is that mere negligence is not enough. The First Circuit holding is to that effect. *Page* v. *Sharpe*, 487 F.2d 567 (1st Cir. 1973). *See also Bogard* v. *Cook*, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979).

political affiliations. As an example, plaintiff cites *McCormick* v. *Edwards*, 479 F. Supp. 295 (M.D. La. 1979), where the district court ruled that public officials could not rely on their subjective claim that they had acted in good faith, while pleading ignorance of clearly established due process rights. The defendants in that case knew of the due process rights but claimed not to know these rights applied to the plaintiff. *Id.* at 299.

This type of analysis is not helpful in the case at bar where Chardon and Ramos have never claimed ignorance of the law, or of the teacher's right not to be discharged for his political affiliations. Defendants do not claim good faith in light of an unexpected, late-breaking constitutional doctrine as discussed in *Woods*. Their theory thoughout this litigation has been that the demotions were for nonpolitical reasons, and that their personal role in these decisions, particularly Secretary Chardon's, was extremely limited. Although plaintiff is correct in asserting that the right in question is a clear proposition of constitutional law it is proof of motive that is the key to unlocking this case.

The burden of proving what can conveniently be analogized as the two-sided qualified immunity coin, with proof of the officials' good faith on one side, or proof of their bad faith on the other, has been seen as mutually exclusive propositions. The First Circuit succinctly stated this in *Gomez* v. *Toledo*, 602 F.2d 1018, 1020 (1st Cir. 1979), *rev'd*, ___ U.S. ___, 100 S.Ct. 1920 (1980):

> It has now been firmly established by a long line of cases that in a civil rights action for damages, public officials acting in their official capacity enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary. *Or to put it conversely*, a plaintiff in such an action must prove that the public official acted in bad faith, meaning with malice or recklessness. *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992,

43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).[12]

(emphasis added).

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[12] The Supreme Court has not passed upon the burden of proving, as opposed to pleading, the official immunity defense. The First Circuit originally had charged the plaintiff with the burden of pleading and proving bad faith on the part of the officials involved. *Gomez* v. *Toledo*, 602 F.2d 1021 (1st Cir. 1979). This decision was reversed by the Supreme Court which held that § 1983 plaintiffs did not have to anticipate what is an affirmative defense, *i.e.*, the good faith actions of the officials involved, by pleading that they acted in bad faith. *Gomez* v. *Toledo*, 446 U.S. 635 (1980). Justice Rehnquist concurred in the Court's otherwise unanimous opinion, but noted his belief that the burden of persuasion, apart from the burden of pleading, remained undecided.

The Court cited several cases to indicate that the burden of persuasion lies with the officials. *McCray* v. *Burrell*, 516 F.2d 357, 370 (4th Cir. 1975) (en banc), *cert. dismissed*, 426 U.S. 471 (1976); *Gilker* v. *Baker*, 576 F.2d 245 (9th Cir. 1978); cited in *Gomez* v. *Toledo*, 446 U.S. at 638 n.5. No contrary rulings were cited.

Further research disclosed a number of cases which leave the burden of proving good faith to the defendant officials. When *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) was remanded, the Second Circuit placed the burden on the police officers to show they had reasonable beliefs regarding the legality of their actions. 456 F.2d 1339, 1347-48 (2d Cir. 1972). *See also Thompson* v. *Burke*, 556 F.2d 231 (3d Cir. 1977); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 61-62 (3d Cir.), *cert. denied*, 429 U.S. 979 (1976); *Bryan* v. *Jones*, 530 F.2d 1210 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 865 (1976); *Glasson* v. *City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975); *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732 (3d Cir. 1973); *Benford* v. *American Broadcasting Companies, Inc.*, 502 F. Supp. 1148 (D. Md. 1980); *Fujiwara* v. *Clark*, 477 F. Supp. 822, 832 (D. Hawaii 1979); *Eckerd* v. *Indian River School District*, 475 F. Supp. 1350, 1368 (D. Del. 1979); *Cameron* v. *Montgomery County Child Welfare Service*,

In this case, defendants contend that the finding that they did not act with a malicious intent is tantamount to a finding that they acted in good faith. If such were the case, defendants would have succeeded in proving that they are clothed with a qualified immunity in this case. Likewise, plaintiff contends that the general liability finding constitutes a finding of bad faith in the objective sense, although they concede that the jury found the defendants did not have the subjective intent to deprive plaintiffs of their rights. Candidly, these admittedly less than definitive findings do not yield what either party would like them to. A finding that the defendants objectively "knew or should have known" discrimination was occurring may be sufficient for a general finding of liability but it does not satisfy the requirements for damages. Defendants proffered and the jury accepted proof that they did not act with a malicious intent. This does not, however, indicate that they acted in good faith.

The peculiar context of the present case simply does not permit the expected converse finding, discussed by the First Circuit, to occur. Instead, readily discernible elements of each alternative appear and can be rationalized to yield a coherent result. This result, however, convinces us that further legal damages cannot be awarded.

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471 F. Supp. 761, 764 (E.D. Pa. 1979); *Forsyth* v. *Kleindienst*, 447 F. Supp. 192, 202 (E.D. Pa. 1978), *modified on other grounds*, 599 F.2d 1203 (3d Cir. 1979); *Eubanks* v. *Clarke*, 434 F. Supp. 1022, 1033-34 (E.D. Pa. 1977); *Mack* v. *Johnson*, 430 F. Supp. 1139, 1147 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1275 (3d Cir. 1978); *Burkhart* v. *Saxbe*, 397 F. Supp. 499, 502 (E.D. Pa. 1975).

In this case, the burden of proof on the qualified official immunity defense was allocated to the defendants. This instruction was accepted without protest by both parties. Therefore, they are bound by it. Fed. R. Civ. P. 51. *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 808 (1949) (civil case); *Johnson* v. *United States*, 318 U.S. 189, 200 (1943); *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); 5A Moore's Federal Practice 51.04 at 51-28, 51-30 to 51-35; *Redmond* v. *Baxley*, 475 F. Supp. 1111, 1115 (E.D. Mich. 1979).

If the proof of the parties is less than definitive upon the defense of qualified official immunity, then the policy concerns of *Scheuer* and *Wood*, the need to protect the decision making powers of public officials, particularly state cabinet members, comes to the fore. The case at bar presents at best ambiguous findings regarding the motivation these officers brought to this situation. In such an ambiguous case, where the Court can exercise its equitable powers to make plaintiffs whole, further damages are not warranted.

This comports with the Supreme Court's instructions regarding § 1983 damages. Although by its own terms § 1983 creates a species of tort liability that admits of no immunities, *Owen* v. *City of Independence, Missouri*, 445 U.S. 622, 650-51 (1980), qualified immunity for public officials has been a product not of legislation, but of "judicial thinking" upon the conflicting policies involved. *Butz* v. *Economou*, *supra*, 438 U.S. at 501-02. Applying this judicially created immunity in accord with the dictates of prior decisions, if damages are not limited we run the risk of "dampen[ing] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, Judge).

Where the Supreme Court has considered the role of damages as compensation for violations of constitutional rights, it has indicated that restraint is recommended. Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Justice Harlan further noted, "[F]or people in Bivens' shoes it is damages or nothing." *Id.* at 410. That is not the case here. As will become clear, the plaintiff here can be given the bulk of the relief sought via equity, without infringing upon the policy concerns discussed by the Court in the qualified official immunity cases. Because that is the case, the efficacy of protecting the official's decision making power deserves full concern, in accord with the teachings of the Supreme Court. For these

reasons, no further proceedings to establish damages are necessary, nor can any be awarded in this case.

(IV) *Injunctive Relief*

While the scope of the qualified immunity defense prohibits the further award of damages, the question of whether equitable relief may be granted poses an entirely different issue. The dominant policy concern which prohibited damages, *i.e.*, the potential chilling effect upon decision makers, is no longer present. The impact that this has on the efficacy of allowing relief was touched upon, albeit briefly, by the Court in *Wood* v. *Strickland*, 420 U.S. at 314-15 n.6, which stated in part, "[I]mmunity from damages does not ordinarily bar equitable relief as well."

A more definitive examination of this reasoning can be found in *Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974). In that case, a class action filed by persons arrested, assaulted, and expelled from a speaking engagement of then President Nixon, sought declaratory relief against similar actions in the future. The district court found the law enforcement officers involved had no constitutional basis for their actions, and granted a preliminary injunction on plaintiff's behalf. The Court of Appeals rejected the officials' defense of qualified official immunity. Referring to *Barr* v. *Mateo* and *Scheuer* v. *Rhodes* (the same portions of which have been restated again in this memorandum, *supra*) the Fourth Circuit indicated its reasons for upholding injunctive relief:

> These two quotations demonstrate that the immunity rule, whatever its scope, is grounded upon the inhibitory effect of suits for money damages. Manifestly, actions for injunctive relief do not have that effect. The federal defendants have cited no case, and we have found none, which holds that the immunity doctrine insulates a public official or public employee from injunctive relief to prevent what would otherwise be an illegal act on his part. *Scheuer* states that the immunity doctrine stems from the same considerations that generated the doctrine of sovereign immunity. That immunity is embodied in the

> eleventh amendment, so that it is significant to note that since Ex Parte Young, 209 U.S. 123 (1908), the law has been settled that, notwithstanding, the eleventh amendment, in an appropriate case a state official may be enjoined by a federal court from future violation of federal law.
>
> Thus, we conclude that the preliminary injunction is not vulnerable to the claim of official immunity.

*Id.* at 1332.

The reasoning in *Rowley* v. *McMillan* is followed by *Stanford Daily* v. *Zurcher*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978). *See also Jacobson* v. *Tahoe Regional Planning Agcy.*, 566 F.2d 1353 (9th Cir. 1977), *aff'd in part, rev'd in part*, 440 U.S. 391 (1979); *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732, 734 (3d Cir. 1972); *Martin* v. *Wray*, 473 F. Supp 1131, 1138 (E.D. Wis. 1979). For these reasons, any ruling on the equitable requests for reinstatement of the plaintiffs, and the concomitant back pay for the period during which they have been demoted, is not made under the stringent concerns previously discussed.

Both parties understood, previous to trial and afterwards, that the decision for or against ordering reinstatement was peculiarly within the discretion of the trial court.[13] Equitable relief has traditionally been the province of the Court. While the Court indicated a preliminary intention of being guided by the jury's finding, the jury's verdict was merely advisory in this respect, not a mandatory finding that binds the Court. It

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[13] The facts which gave birth to the claim for equitable relief were adjudicated by the jury. The plaintiffs are wholly incorrect when they state that this aspect of the case was tried by the jury. In fact, the plaintiffs had previously taken the position that had the jury found for the defendants, the district court, nevertheless, could order reinstatement and other relief independent of that verdict. To now make such an inconsistent argument does not advance their case.

was always accepted by the parties that the right to trial by jury did not extend to the right of reinstatement. *See Ross* v. *Bernhard*, 396 U.S. 531, 533 (1970).

What plaintiffs did succeed in doing at trial was to establish a cause of action under Section 1983, despite the fact that the jury's findings preclude damages against the defendants involved. The proof of a § 1983 action, absent a claim of qualified official immunity requires only two elements: (1) That the defendants acted under color of state law, and (2) that a constitutional right has been denied. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150 (1970).

Since there was a violation, "an equity court possesses some discretionary power to award damages in order to do complete justice." *Walters* v. *Marathon Oil*, 7th Cir. March 9, 1981 (No. 80-13-) citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). In *Albemarle*, a Title VII case, the Court held that back pay should not be withheld without special reason. When a public employee is discharged in violation of his First Amendment or other constitutional rights, he is entitled to reinstatement and back pay. *Eckerd* v. *Indiana River School District*, 475 F. Supp. 1350, 1365 (D. Del. 1979).

Weighing all of the competing interests in this case, all of the teachers in this consolidated case are ordered to be reinstated and given back pay, pursuant to the terms of the attached order.

This award is made in light of the testimony presented at trial, the verdict of the jury, and the interrogatory answers as interpreted by this Court. In equity, if other remedies are made available to the plaintiffs, this award would of necessity have to be fully reconsidered and evaluated. "[S]ince it is the historic purpose of equity to secure complete justice, the courts are able to adjust the remedies so as to grant the necessary relief, *Equal Employment Opportunity Commission* v. *General Tel. Co. of Northwest, Inc.*, 599 F.2d 322 (9th Cir. 1979), *aff'd*, 100 S.Ct. 1698 (1980) . . . ," quoted in *Walters* v. *Marathon Oil*, *supra*. This award is also in accordance with the principles of § 1983 relief.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

## CIVIL NO. 79-198

JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, *et al.*, *Defendants*.

## FINAL ORDER AND JUDGMENT

On May 12, 1981, this Court entered an extensive order directing that plaintiff educators be reinstated to their previous positions in the Puerto Rican school system, and that back pay awards be computed to make plaintiffs whole. After delays caused by defendants' inability to provide this Court with the necessary information in a timely fashion, the Court is now ready to rule on the back pay issue. In 48 of the 55 consolidated cases, the parties have agreed to the proper measure of compensation. Pursuant to the terms of the May order, the Court now orders defendants to pay each plaintiff the amounts agreed upon.

| CASE NO. | NAME | AMOUNT |
|---|---|---|
| 78-1156 | Jose Ortiz Rivera | $6,000.00 |
| 79-66 | Carmen Nunel Rivera | |
| 79-67 | Syraida Rosa Cardona | $8,400.00 |
| 79-70 | Carmen L. Negron Marin | $1,800.00 |
| 79-72 | Aida Rodriguez Rios | $2,450.00 |
| 79-73 | Carmen H. Montes Velez | $1,818.75 |
| 79-74 | Carmen Garcia Rosado | $4,545.56 |
| 79-76 | Noelia Torres de Cantres | $8,332.76 |
| 79-82 | Iraida Sanchez Marquez | $6,000.00 |
| 79-83 | Antonio Rodriguez Rivera | $ 720.00 |
| 79-85 | Edda I. De Ayala Lafuente | $ 196.48 |
| 79-167 | Josefa Marrero Ayala | No back pay |
| 79-169 | Nilsa Cardona Flores | $3,600.00 |

| CASE NO. | NAME | AMOUNT |
|---|---|---|
| 79-170 | Jose A. Alvarado | $3,120.00 |
| 79-176 | Elba M. Colon Torres | $1,837.50 |
| 79-179 | Carmen Ortiz Lemois | $7,200.00 |
| 79-182 | Andres A. Hernandez Ortiz | $4,345.00 |
| 79-183 | Aurora Sierra Pizarro | $ 375.00 |
| 79-185 | Virginia Otero Arroyo | $4,350.00 |
| 79-194 | Maria V. Pagan Seda | $1,300.00 |
| 79-197 | Ana Mercedes Ortiz Colon | $7,175.00 |
| 79-198 | Juan Fumero Soto | $1,920.00 |
| 79-199 | Dora Castro de Aguilar | $3,600.00 |
| 79-200 | Antonio Vega Ortiz | $ 300.00 |
| 79-203 | Jose A. Surillo Rodriguez | $1,571.71 |
| 79-206 | Reinaldo Rodriguez Solivan | $9,120.00 |
| 97-209 | Sylvia M. Denis | $6,000.00 |
| 79-210 | Bienvenido Castro Del Valle | $7,200.00 |
| 79-212 | Kremlly Rodriguez Valentin | $2,450.00 |
| 79-213 | Elba Rosario de Bravo | $ 520.00 |
| 79-215 | Lydia Munoz Morales | $ 710.00 |
| 79-218 | Angel Luis Marrero Gonzalez | $1,570.04 |
| 79-219 | Ramon Norat Zayas | $2,050.00 |
| 79-220 | Charles H. Quiles Mariani | No back pay |
| 79-221 | Carmen T. Lugo Sotero | $ 112.50 |
| 79-224 | Iris Camelia Velez Morales | $5,340.00 |
| 79-227 | Jorge O. Principe Galarza | $3,600.00 |
| 79-323 | Santiago Gonzalez Velazquez | $1,084.96 |
| 79-325 | Bienvenido Rivera Diaz | $1,200.00 |
| 79-330 | Angela Colon Santiago | $2,400.00 |
| 79-332 | Joaquin Cruz Mendez | $2,400.00 |
| 79-333 | Ursula Aguilar Quintero | $8,400.00 |
| 79-334 | Aminta Rivera Cardonna | No back pay |
| 79-335 | Roberto Cruz Cruz | $1,920.00 |
| 79-164 | Jose Aponte de la Torre | -0- |
| 79-79 | Efrain Tacoronte Ruiz | -0- |
| 79-336 | Nelson Velez Quinones | $2,450.00 |
| 79-357 | Cristina Cancel Cuevas | $1,200.00 |
| 79-358 | Maria D. Guerra Navarro | $2,400.00 |
| 79-361 | Francisco Bonilla Ocasio | No back pay |
| 79-362 | Heriberto Gallardo Gutierrez | No back pay |

In seven (7) cases, the parties have not been able to agree. In two of these cases, 79-79, Efrain Tacoronte Ruiz, and 79-326, Carmen M. Morales Hernandez, the disputes are apparently only upon the proper figure involved, and the differences are comparatively minor. While the Court will not enter a final back pay figure in these two cases without further consultation with counsel, these two plaintiffs are to be granted the reinstatement relief set out in the May order.

Despite the two month period granted to gather information, in one case, 79-66, Carmen Nunez Rivera, defendants have indicated they are uncertain as to her status. The defendants are directed to immediately ascertain whether the suggested back pay figure of $3,600 is correct. If it is, then she should be accorded the same relief as the 48 other cases. Should the defendants continue to disagree as to the amount of back pay, they are directed to promptly notify this Court of that fact and the basis of their disagreement. This plaintiff is to be accorded the same reinstatement relief as the plaintiffs which have already been discussed.

In 79-164, plaintiff Jose E. Aponte De la Torre claims he was demoted from a position as Vocational Director III to teacher of Industrial Arts. It is ordered that he be reinstated according to the terms of the May order to his former position. The remainder of that case regarding his claim that demotion from one position caused the loss of another part-time positio and further damages will require further consultation.

Inasmuch as the pay discrepancy is quite large, the Court will entertain further proceedings to deal with this problem.

Similarly, there are polar differences between the parties' position regarding Nos. 79-329, Juan Rivera Pagan, 79-364, Julio E. Colon, and 79-188, Carmen D. Perez Roman. These plaintiffs contend they were not demoted but dismissed, and have consequently far greater damages. Defendants admit the dismissals, but contend they are unrelated to the political problems found in the main consolidated cases. All relief, monetary and reinstatment, will be stayed in these cases pending further proceedings.

Final judgments will be entered in accordance with the foregoing terms of this order in accordance with F.R.C.P. 54(b).

Filing this order, along with the contemporaneous filing of an order dismissing defendants' final motion to overturn the Court's May 12 order, largely concludes the lengthy and protracted proceedings in these cases. This Court takes the opportunity to reiterate that the reinstatement relief ordered in May is to be provided prior to August 3, 1981, the beginning of the new school year. No stay of that relief will be made by this Court at this late date. The prompt compliance with the terms of this and the May order will be required and expected of both parties.

Entered July 24, 1981

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

**CIVIL ACTION NO. 79-198**
**CONSOLIDATED CASES**

JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

*Defendants.*

## NOTICE OF APPEAL

Notice is hereby given that Carlos Chardon and Oscar Ramos, defendants above named, hereby appeal to the United States Court of Appeals for the First Circuit from the Final Order and Judgment entered in this action on the twenty-ninth day of July, 1981.

Dated July 29, 1981.

/s/ John G. DeGooyer
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San Juan, Puerto Rico 00902

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

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## CIVIL NO. 79-198

78-1156
79-66 79-85 79-194 79-215 79-330
79-67 79-164 79-197 79-218 79-332
79-70 79-167 79-199 79-219 79-333
79-72 79-169 79-200 79-220 79-334
79-73 79-170 79-203 79-221 79-335
79-74 79-176 79-206 79-224 79-336
79-76 79-179 79-209 79-227 79-357
79-79 79-182 79-210 79-323 79-358
79-82 79-183 79-212 79-325 79-361
79-83 79-185 79-213 79-326 79-362

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JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, *et al.*, *Defendants*.

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## JUDGMENT

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The Court, through Honorable Robert A. Grant, has entered an Order on July 29, 1981, in furtherance of the Court's Order of May 12, 1981. The Court has ordered that defendants reinstate the following plaintiffs to the respective position each held, or its functional equivalent, at the time of their demotion and that defendants pay each plaintiff the amounts agreed upon as follows:

| CASE NO. | NAME | AMOUNT |
|---|---|---|
| 78-1156 | Jose Ortiz Rivera | $6,000.00 |
| 79-67 | Syraida Rosa Cardona | $8,400.00 |
| 79-70 | Carmen L. Negron Marin | $1,800.00 |
| 79-72 | Aida Rodriguez Rios | $2,450.00 |
| 79-73 | Carmen H. Montes Velez | $1,818.75 |
| 79-74 | Carmen Garcia Rosado | $4,545.56 |
| 79-76 | Noelia Torres de Cantres | $8,332.76 |

| CASE NO. | NAME | AMOUNT |
|---|---|---|
| 79-82 | Iraida Sanchez Marquez | $6,000.00 |
| 79-83 | Antonio Rodriguez Rivera | $ 720.00 |
| 79-85 | Edda I. De Ayala Lafuente | $ 196.48 |
| 79-167 | Josefa Marrero Ayala | No back pay |
| 79-169 | Nilsa Cardona Flores | $3,600.00 |
| 79-170 | Jose A. Alvarado | $3,120.00 |
| 79-176 | Elba M. Colon Torres | $1,837.50 |
| 79-179 | Carmen Ortiz Lemois | $7,200.00 |
| 79-182 | Andres A. Hernandez Ortiz | $4,345.00 |
| 79-183 | Aurora Sierra Pizarro | $ 375.00 |
| 79-185 | Virginia Otero Arroyo | $4,350.00 |
| 79-194 | Maria V. Pagan Seda | $1,300.00 |
| 79-197 | Ana Mercedes Ortiz Colon | $7,175.00 |
| 79-198 | Juan Fumero Soto | $1,920.00 |
| 79-199 | Dora Castro de Aguilar | $3,600.00 |
| 79-200 | Antonio Vega Ortiz | $ 300.00 |
| 79-203 | Jose A. Surillo Rodriguez | $1,571.71 |
| 79-206 | Reinaldo Rodriguez Solivan | $9,120.00 |
| 97-209 | Sylvia M. Denis | $6,000.00 |
| 79-210 | Vienvenido Castro Del Valle | $7,200.00 |
| 79-212 | Kremlly Rodriguez Valentin | $2,450.00 |
| 79-213 | Elba Rosario de Bravo | $ 520.00 |
| 79-215 | Lydia Munoz Morales | $ 710.00 |
| 79-218 | Angel Luis Marrero Gonzalez | $1,570.04 |
| 79-219 | Ramon Norat Zayas | $2,050.00 |
| 79-220 | Charles H. Quiles Mariani | No back pay |
| 79-221 | Carmen T. Lugo Sotero | $ 112.50 |
| 79-224 | Iris Camelia Velez Morales | $5,340.00 |
| 79-227 | Jorge O. Principe Galarza | $3,600.00 |
| 79-323 | Santiago Gonzalez Velazquez | $1,084.96 |
| 79-325 | Bienvenido Rivera Diaz | $1,200.00 |
| 79-330 | Angela Colon Santiago | $2,400.00 |
| 79-332 | Joaquin Cruz Mendez | $2,400.00 |
| 79-333 | Ursula Aguilar Quintero | $8,400.00 |
| 79-334 | Aminta Rivera Cardonna | No back pay |
| 79-335 | Roberto Cruz Cruz | $1,920.00 |
| 79-336 | Nelson Velez Quinones | $2,450.00 |
| 79-357 | Cristina Cancel Cuevas | $1,200.00 |
| 79-358 | Maria D. Guerra Navarro | $2,400.00 |
| 79-361 | Francisco Bonilla Ocasio | No back pay |
| 79-362 | Heriberto Gallardo Gutierrez | No back pay |

Wherefore, IT IS ORDERED AND ADJUDGED that defendants reinstate the above named plaintiffs in accordance with the Court's Order of May 12, 1981, and that defendants pay each of the above named plaintiffs the above mentioned amounts as back pay.

In Cases No. 79-79, Efrain Tacoronte Ruiz; 79-326, Carmen M. Morales Hernandez; 79-66, Carmen Nunez Rivera; and 79-164, Jose E. Aponte de la Torre, the Court ordered that reinstatement relief be granted in accordance with the terms of the Order of May 12, 1981, and that back pay and damages claim be held in abeyance for further consultation.

Wherefore, IT IS FURTHER ORDERED AND ADJUDGED that reinstatement relief be granted by defendants to the above named plaintiffs in accordance with the terms of the Order of May 12, 1981.

Regarding Cases Nos. 79-329, Juan Rivera Pagan; 79-364, Julio E. Colon; and 78-188, Carmen D. Perez Roman, the Court finally ordered that all relief, monetary and reinstatement, be stayed pending further proceedings.

IT IS SO ORDERED.

San Juan, Puerto Rico, July 31, 1981.

RAMON A. ALFARO
Clerk of the Court

/s/ By: Sarita Tejedor
SARITA TEJEDOR
Supervisor Deputy Clerk

IN THE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

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**CIVIL ACTION NO. 79-198 (Tr)**
**(CONSOLIDATED CASES)**

---

JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary in charge of the Personnel of Public Education of the Commonwealth of Puerto Rico,

*Defendants.*

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## NOTICE OF CROSS APPEALS

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Notice is hereby given that Juan Fumero Soto, et al,* Plaintiffs in the consolidated cases herein, hereby cross-appeal to the United States Court of Appeals for the First Circuit from the Judgment entered in this action on the 31st day of July, 1981, according to Judge Robert A. Grant's Final Order and Judgment of July 29, 1981, in furtherance of the Order of May 12, 1981, as regards the Court's conclusion that the relief granted exhausts the remedies and damages available to plaintiffs, that the jury's findings vitiate the need to hold compensatory and punitive damages trials and also regarding the Court's legal conclusion that defendants individually are

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*See Attachment A, made a part of this Notice.

protected by the qualified immunity defense and are therefore not individually liable for compensatory and punitive damages.

Dated August 12, 1981.

/s/ Jesus R. Rabell Mendez
JESUS R. RABELL MENDEZ

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Attorneys for Plaintiffs

OF COUNSEL:
PROF. SHELDON NAHMOD
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Chicago, Illinois 60606
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## ATTACHMENT A

The plaintiffs cross-appealing herein are:

| | CASE NO. | NAME |
|---|---|---|
| 1) | 78-1156 | Jose Ortiz Rivera |
| 2) | 79-67 | Syraida Rosa Cardona |
| 3) | 79-70 | Carmen L. Negron Marin |
| 4) | 79-72 | Aida Rodriguez Rios |
| 5) | 79-73 | Carmen H. Montes Velez |
| 6) | 79-74 | Carmen Garcia Rosado |
| 7) | 79-76 | Noelia Torres de Cantres |
| 8) | 79-82 | Iraida Sanchez Marquez |
| 9) | 79-83 | Antonio Rodriguez Rivera |
| 10) | 79-85 | Edda I. de Ayala Lafuente |
| 11) | 79-167 | Josefa Marrero Ayala |
| 12) | 79-169 | Nilsa Cardona Flores |
| 13) | 79-170 | Jose A. Alvarado |
| 14) | 79-176 | Elba M. Colon Torres |
| 15) | 79-179 | Carmen Ortiz Lemois |
| 16) | 79-182 | Andres A. Hernandez Ortiz |
| 17) | 79-183 | Aurora Sierra Pizarro |
| 18) | 79-185 | Virginia Otero Arroyo |
| 19) | 79-194 | Maria V. Pagan Seda |
| 20) | 79-197 | Ana Mercedes Ortiz Colon |
| 21) | 79-198 | Juan Fumero Soto |
| 22) | 79-199 | Dora Castro de Aguilar |
| 23) | 79-200 | Antonio Vega Ortiz |
| 24) | 79-203 | Jose A. Surillo Rodriguez |
| 25) | 79-206 | Reinaldo Rodriguez Solivan |
| 26) | 79-209 | Sylvia M. Denis |
| 27) | 79-210 | Bienvenido Castro del Valle |
| 28) | 79-212 | Kremly Rodriguez Valentin |
| 29) | 79-213 | Elba Rosario de Bravo |
| 30) | 79-215 | Lydia Munoz Morales |
| 31) | 79-218 | Angel Luis Marrero Gonzalez |
| 32) | 79-219 | Ramon Norat Zayas |
| 33) | 79-220 | Charles H. Quiles Mariani |

| | CASE NO. | NAME |
|---|---|---|
| 34) | 79-221 | Carmen T. Lugo Sotero |
| 35) | 79-224 | Iris Camelia Velez Morales |
| 36) | 79-227 | Jorge O. Principe Galarza |
| 37) | 79-323 | Santiago Gonzalez Velazquez |
| 38) | 79-325 | Bienvenido Rivera Diaz |
| 39) | 79-330 | Angela Colon Santiago |
| 40) | 79-332 | Joaquin Cruz Mendez |
| 41) | 79-333 | Ursula Aguilar Quintero |
| 42) | 79-334 | Aminta Rivera Cardona |
| 43) | 79-335 | Roberto Cruz Cruz |
| 44) | 79-336 | Nelson Velez Quinones |
| 45) | 79-357 | Cristina Cancel Cuevas |
| 46) | 79-358 | Maria D. Guerra Navarro |
| 47) | 79-361 | Francisco Bonilla Ocasio |
| 48) | 79-362 | Heriberto Gallardo Gutierrez |
| 49) | 79-79 | Efrain Tacoronte Ruiz |
| 50) | 79-326 | Carmen M. Morales Hernandez |
| 51) | 79-66 | Carmen Nunez Rivera |
| 52) | 79-164 | Jose E. Aponte de la Torre |
| 53) | 79-329 | Juan Rivera Pagan |
| 54) | 79-364 | Julio E. Colon |
| 55) | 78-188 | Carmen D. Perez Roman |

IN THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

**CIVIL NO. 79-198**
**CONSOLIDATED CASES**

JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary in charge of the Personnel of Public Education of the Commonwealth of Puerto Rico,

*Defendants.*

**ORDER**

Pursuant to this Court's Final Order and Judgment, entered in these consolidated cases on July 29, 1981, the parties have reached an agreement on certain outstanding back pay and reinstatement matters. Now, in accordance with the terms of that agreement, this Court does hereby, effective nunc pro tunc July 29, 1981, ORDER the defendants to pay the following plaintiffs the amounts agreed upon, as follows:

1- Jose E. Aponte de la Torre (Civil No. 79-164) — $27,476.00.

2- Juan Rivera Pagan (Civil No. 79-329) — $43,255.00

3- Julio E. Colon (Civil No. 79-364) — $45,310.00.

4- Carmen D. Perez Roman (Civil No. 79-188) — $42,195.00.

5- Carmen Nunez Rivera (Civil No. 79-66) — $3,600.00.

6- Efrain Tacoronte Ortiz (Civil No. 79-79) — $475.00.

7- Carmen M. Morales Hernandez (Civil No. 97-326) — $165.00.

It is further ORDERED that plaintiffs Juan Rivera Pagan (Civil No. 79-329), Julio E. Colon (Civil No. 79-364), and Carmen D. Perez Roman (Civil No. 79-188), be reinstated to the position each held, or its functional equivalent, at the time of their dismissals, according to the terms of the May 12, 1981 Order of this Court.

Defendants maintain that the back pay awards entered in these consolidated cases are in violation of the Eleventh Amendment, and by agreeing to the figures set out above, defendants do not waive any rights on appeal as to that position. Further, the parties do not, by consenting to the terms of this Order, waive any rights to any issues involved in the appeals of these consolidated cases, now pending before the United States Court of Appeals for the First Circuit.

Entered: 7 January 1982

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

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**Civil No. 79-198**
**Civil No. 79-164**
**Civil No. 79-329**
**Civil No. 79-188**
**Civil No. 79-66**
**Civil No. 79-79**
**Civil No. 79-326**

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JUAN FUMERO SOTO, *Plaintiff*,

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico, and OSCAR RAMOS, individually and as Assistant Secretary in charge of the Personnel of Public Education of the Commonwealth of Puerto Rico,

*Defendants.*

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**JUDGMENT**

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The Court having entered an Order through the Hon. Robert A. Grant,

IT IS ORDERED AND ADJUDGED that defendants pay plaintiffs the following amounts:

1. Jose E. Aponte de la Torre (Civil No. 79-164) = $27,476.00.
2. Juan Rivera Pagan (Civil No. 79-329) = $43,255.00
3. Julio E. Colon (Civil No. 79-364) = $45,310.00.
4. Carmen D. Perez Roman (Civil No. 79-188) = $42,195.00.
5. Carmen Nunez Rivera (Civil No. 79-66) = $3,600.00.

6. Efrain Tacoronte Ortiz (Civil No. 79-79) = $475.00.
7. Carmen M. Morales Hernandez (Civil No. 79-326) = $165.00.

and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs Juan Rivera Pagan (Civil No. 79-329), Julio E. Colon (civil No. 79-364), and Carmen Perez Roman (Civil No. 79-188) be reinstated to the position each held, or its functional equivalent, at the time of their dismissals, and

IT IS FURTHER ORDERED AND ADJUDGED that the judgment be entered nunc pro tunc as of July 29, 1981.

SO ORDERED.

San Juan, Puerto Rico, February 17, 1982.

/s/ Ramon A. Alfaro
RAMON A. ALFARO
Clerk of the Court

THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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**No. 80-1237, *et al.***

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RAFAEL RIVERA FERNANDEZ, *et al.*,
*Plaintiffs-Appellants,*

v.

CARLOS CHARDON, ETC., *et al.*,
*Defendants-Appellees.*

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**On Remand From The Supreme Court**
**Of The United States**

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Before
CAMPBELL, BOWNES, and BREYER,
*Circuit Judges.*

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**Nos. 81-1567**
**81-1607**

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JUAN FUMERO SOTO, *et al.*,
*Plaintiffs-Appellees-Cross-Appellants,*

v.

CARLOS CHARDON, ETC., *et al.*,
*Defendants-Appellants-Cross-Appellees.*

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**Appeals From The United States District Court**
**For The District Of Puerto Rico**

[HON. ROBERT A. GRANT,* *U.S. District Judge*]

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*Of the Northern District of Indiana, sitting by designation.

Before
COFFIN, *Chief Judge*,
GIBSON,** *Senior Circuit Judge*,
BOWNES, *Circuit Judge*.

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*Sheldon H. Nahmod, Hiram R. Cancio, Harry R. Nadal-Arcelay, Jaime R. Nadal-Arcelay, Jesus R. Rabell-Mendez,* and *Cancio Nadal & Rivera* on brief for appellants.

*K. Martin Worthy, John G. DeGooyer, Stephen L. Humphrey, Hamel, Park, McCabe & Saunders, Hector Reichard De Cardona,* Secretary of Justice, and *Ines Eguia De Casanova,* Attorney, Department of Justice of Puerto Rico, on brief for appellees.

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June 8, 1982

BOWNES, *Circuit Judge*. Before us in the instant action are two groups of consolidated cases that represent fifty-five and thirty-six cases, respectively. All ninety-one cases are actions based on 42 U.S.C. § 1983 charging illegal acts of political discrimination. The first group of consolidated cases, *Fumero Soto* v. *Chardon*, is an appeal from a jury verdict that defendants are liable to plaintiffs in the fifty-five cases and from the relief ordered by the court in its equitable power. The second group of consolidated cases, *Rivera Fernandez* v. *Chardon*, is on remand from the Supreme Court, which, in *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341 (Nov. 2, 1981), reversed our decision on the statute of limitations issue in these cases, *Rivera Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981).[1] The *Rivera Fernandez* cases had been dismissed by the district

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**Of The Eighth Circuit, sitting by designation.

[1] Our decision in *Rivera Fernandez* dealt with only twenty-three of the cases; we disposed of the other thirteen cases with separate but identical judgments. *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341, 3341 n.1 (Nov. 2, 1981).

court and were not tried on the merits. We deal with these two sets of cases together because they both present questions concerning the tolling of the statute of limitations that are not foreclosed by the prior decisions in *Rivera Fernandez*. In addition, the defendants in *Fumero Soto* argue that the jury verdict was not supported by the evidence and that the damages award against the Puerto Rico Department of Education violated the eleventh amendment; plaintiffs in *Fumero Soto* contend that the individual defendants enjoy no immunity.

**The Facts and Case Histories**

All the *Fumero Soto* and *Rivera Fernandez* cases arose out of essentially the same facts. The plaintiffs in all cases held nontenured administrative positions in the Commonwealth of Puerto Rico Department of Education during the school year 1976-1977. The defendants are Carlos Chardon, then Secretary of Education for the Commonwealth, Oscar Ramos, then and now Assistant Secretary for Personnel in the same department, and Maria Socorro Lacot, now the Secretary of Education, who was substituted for Chardon in his official and individual capacities. Charon and Ramos were originally sued in their official and individual capacities. The events leading up to the instant actions began in January, 1977, when Carlos Romero Barcelo of the New Progressive Party (NPP) replaced Rafael Hernandez Colon of the Popular Democratic Party (PDP) as governor. Chardon and Ramos, members of the NPP, soon assumed positions in the Department of Education under the new regime. Chardon and Ramos, according to plaintiffs' complaints, then determined to remove nonpermanent administrative personnel who were active in the PDP or parties other than the NPP.

All the plaintiffs received letters—most of them in May and June 1977—from Julio Cintron Lopez, Director of the Teaching Personnel Division, informing them that they would not be reappointed to the administrative positions they currently held for the school year 1977-78 and that they would instead be required to return to the lower-paying, tenured teaching posi-

tions that they had held before. Three of the *Rivera Fernandez* plaintiffs had not previously held tenured teaching posts, so they were discharged. Most, if not all, of the plaintiffs sent letters of protest to Chardon, objecting to their demotion or termination and informing him that they were referring the matter to the Teachers Association of Puerto Rico for appropriate legal action.[2]

On June 19, 1978, one demoted employee, Jose Ortiz Rivera, filed a class action against Chardon and Ramos in their individual and official capacities on behalf of all persons discharged or demoted by Chardon and Ramos for political reasons, claiming a violation of first and fourteenth amendment rights protected by 42 U.S.C. § 1983[3] and P.R. Laws Ann. tit. 18, §§ 214, 249a, 249e.[4] Class certification was denied on August 21, 1978, be-

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[2] The letters were all virtually identical, the texts of which read in substance as follows:

> Dear Mr. Secretary:
>
> I have received a letter from the Department you direct dated [date], signed by Mr. Julio Cintron Lopez, Director of the Teaching Personnel Division. I am not in agreement with your decision.
>
> To that effect, I have sent a copy of the letter to the Teachers Association of Puerto Rico, so that said organization would instruct its Legal Division to take the corresponding action.
>
> In the meanwhile, I will obey the order issued by you.
>
> Sincerely,

[3] 42 U.S.C. § 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[4] P.R. Laws Ann. tit. 18, § 214 provides as follows:

> Every public-school teacher in active service through an appointment made in accordance with the school law, the regulations of the Department of Education, and the regulations of the

cause the class was not so numerous that joinder was impracticable. Fed.R.Civ.P. 23(a)(1). Plaintiffs then filed complaints individually in January, 1979, the earliest filings occurring on January 10. The individual complaints repeated the claims of Ortiz Rivera's class suit.

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Commonwealth Board for Vocational and Technical Education, who shall have practiced as such in a school of any category during the probation period hereinafter specified, shall be entitled to be contracted as a permanent teacher in the category in which he may be practicing his profession at the expiration of the said probation period, without any further proof of classification or professional ability than the holding of a regular license of the same category of the position held by the teacher and to have, in the opinion of the Department, performed satisfactory work. For the purposes of sections 214-218 of this title, no consideration shall be given to the time such teachers may have been practicing as temporary teachers. Such teachers shall be entitled to be contracted as permanent teachers in the municipality where they may be teaching at the expiration of the probation period. The time worked by teachers with regular certificates as substitutes and who have performed satisfactory work in positions of the same category shall be confirmed as probationary period. The equivalence of the two (2) years of probationary period shall comprise the work performed with a substitute or probationary contract during two (2) consecutive years. Such teachers shall be entitled to be contracted as probationary or permanent teachers in the municipality where they may be teaching when entitled to a regular position.

P.R. Laws Ann. tit. 18, § 249a provides as follows:

For the purposes of sections 249a-249e of this title, all public-school teachers of Puerto Rico shall be considered as officers or employees of the Commonwealth Government while they are in active service, irrespective of the form and manner in which they may render their services to the people of Puerto Rico. By public-school teachers shall be understood, for the purposes of sections 249a-249e of this title, all teaching personnel, which includes both the teachers in charge of the teaching and special services directly connected with the teaching work, and the officers or employees in technical tasks or in school supervision and administration; all the teaching personnel contracted by the Vocational Education Board of Puerto Rico and those teachers contracted as such by other departments or agencies of the Commonwealth of Puerto Rico.

The history of the *Rivera Fernandez* cases is as follows. The district court dismissed the cases on the ground that they were barred by Puerto Rico's one-year statute of limitations. *E.g.*, *Aviles Navarro* v. *Chardon*, 506 F. Supp. 229 (D.P.R. 1980). We reversed, holding that the letter notifications did not trigger the statute, but that the actual demotions and discharges did and that suit was filed within one year of these events. *Rivera Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981). The Supreme Court reversed, finding that *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), controlled and that the letter notifications started the statute running. *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341 (Nov. 2, 1981).

Meanwhile, decision was reserved on the statute of limitations question in the remaining fifty-five cases *(Fumero Soto)*. These cases were consolidated for trial, and the trial was bifurcated into liability and damages phases. After a five-day trial of the liability issues, a six-person jury returned unanimous verdicts in favor of the plaintiffs. The jury was also asked to answer special interrogatories, whether Chardon or Ramos acted with malicious intent to deprive plaintiffs of their constitutional or other rights. The jury answered these questions in the negative. The district court then asserted its equitable power to declare a remedy and ordered the Department of Education to reinstate those plaintiffs still in its employ to the positions they had held before their demotions and to give them back pay reflecting the difference in salary between their former positions and the positions to which they were demoted. Plaintiffs who had left the Department were held not

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P.R. Laws Ann. tit. 18, § 249e provides as follows:

> The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignment, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status.

entitled to reinstatement and were to receive back pay only for the period from the time of demotion to the time they left. On the basis of the jury's findings of no malicious intent, the court refused to award damages against Chardon and Ramos in their individual capacities or to award punitive damages. Defendants appealed; on August 14, 1981, we stayed that portion of the order requiring back pay because of "significant questions" as to its validity.

**The Issues**

The general issue is whether claims by any or all of the *Rivera Fernandez* and *Fumero Soto* plaintiffs were barred by the statute of limitations.[5] Before discussing the separate arguments raised, it is useful to mark a few recognized principles. In the absence of a federal statute of limitations, the analogous state statute is applied to the federal cause of action, *E.g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *O'Sullivan* v. *Felix*, 233 U.S. 318, 322 (1914). In Puerto Rico, the limitations period applicable to a § 1983 claim alleging violation of first amendment rights is one year. P.R. Laws Ann. tit. 31, § 5298(2); *Graffals Gonzalez* v. *Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977) (per curiam). At least as a matter of *federal* law, the filing of a class action will toll the statute of limitations for named and unnamed members of the class, and the statute will resume running when class certification is denied. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 561 (1974).

Under *American Pipe*, the one-year statute of limitations would have been tolled on June 19, 1978, when Ortiz Rivera

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[5] We take it that statute of limitations defenses were preserved in all cases. Defendants state that they raised the affirmative defense in timely fashion, and there is no contrary evidence. Nor do we believe that the defense was subsequently waived in any case, although the record on which plaintiffs rely for this argument is lamentably unclear.

filed his class action. The tolling would have ended, and the remaining portion of the limitations period would have recommenced running on August 21, 1978, when the district court declined to certify the class. Over half the plaintiffs in both sets of cases had received notice of demotion more than one year before Ortiz Rivera filed suit, so their claims would already have been time-barred. The remaining plaintiffs would have had from one to one hundred and thirty-eight days to file individual complaints after August 21, 1978. The earliest individual complaints were not filed, however, until January 10, 1979, after expiration of the remaining one hundred and thirty-eight day period.

Plaintiffs mount three attacks on the statute of limitations: that *Ricks* should not be applied retroactively; that the letters of protest tolled the statute of limitations;[6] and that the denial of class action certification in Ortiz Rivera's suit did not merely reactivate the statute of limitations, the *American Pipe* rule, but instead caused it to run anew. It is important to determine at the outset the relationships between these three contentions. The critical dates must be kept in mind; May-June 1977, notification by letters; August 31, 1977, plaintiffs vacate their positions; June 19, 1978, class action filed; August 21, 1978, class action dismissed; and January 10, 1979, first individual complaint filed.

The first claim, nonretroactivity, is insufficient alone to save all but a few of the suits because it would merely move the accrual date from the dates demotion letters were received to the date plaintiffs had to leave their positions, August 31, 1977. The class suit was filed nine months, nineteen days after that, so that, under the *American Pipe* rule, when class certification was denied on August 21, 1978, only two months, eleven days would have remained for all plaintiffs to file complaints. The period thus would have expired on November 1, 1978, before which time no individual complaints had been filed.

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[6] Plaintiffs also argue in the alternative that this issue should be certified to the Supreme Court of Puerto Rico.

The second position, that the letters of protest sent by plaintiffs were sufficient under Puerto Rican law to toll the statute of limitations so that it commenced running anew, is also inadequate alone in all but a few cases. This would save the otherwise time-barred claims of those who received notice of demotion prior to June 19, 1977, but who did not write a protest letter until after that date. The filing of the class action would then have been timely as to them. After certification was denied on August 21, 1978, they would have had whatever time had not expired from the one-year period in which to sue individually. The unexpired time would be insufficient in most cases, however, to carry over into January.

The third contention, that denial of class certification on August 21, 1978, starts the one-year statute running from scratch, by itself would save claims that were based on notices of termination received within a year prior to filing of the class action, June 19, 1978. This rule alone would not help any of the *Rivera Fernandez* plaintiffs, all of whom received discharge notifications before June 19, 1977. In combination with the nonretroactivity contention, this would save all *Rivera Fernandez* and *Fumero Soto* claims because they would not accrue until August 31, 1977. In combination with the letter tolling contention, the third argument would save those additional claims in which notice was received before June 19, 1977, but a letter of protest was sent after that date.

**The Tolling Effect of the Class Action**

The linchpin of plaintiffs' contentions, therefore, is that, under Puerto Rican law, a class action will cause the statute of limitations to begin running anew. Puerto Rican tolling rules, rather than the federal rule of *American Pipe* in which the running of the limitations period is merely suspended, apply, unless they are inconsistent with federal law. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-86 (1980). Under P.R. Laws Ann. tit. 31, § 5303, the limitations period against an action ceases to run when the action is instituted in court; if the action is discontinued, the case law has held that the limitations

period begins to run anew from that time. *E.g.*, *Feliciano* v. *Puerto Rico Aqueduct & Sewer Auth.*, 93 P.R.R. 638, 644 (1966); *Heirs of Gorbea* v. *Portilla*, 46 P.R.R. 279 (1934); *De Jesus* v. *De Jesus*, 37 P.R.R. 143 (1927). *See also Hernandez del Valle* v. *Santa Aponte*, 440 F. Supp. 254 (D.P.R. 1977), *rev'd on other grounds*, 575 F.2d 321 (1st Cir. 1978); *Bedard* v. *Consolidated Mutual Insurance Co.*, 313 F. Supp. 1021, 1021-22 (D.P.R. 1970). This tolling is effective only with regard to identical causes of action; the filing of one action does not toll the statute of limitations for all claims arising out of the same facts. *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315, 319-20 (1st Cir. 1978). The substantive claims asserted in Ortiz Rivera's class action complaint were identical to those alleged in subsequent individual complaints. The question here is whether a class action is different from an individual complaint—at least as to unnamed plaintiffs in the class action—for purposes of the identical claim rule. The Puerto Rico Supreme Court has not ruled on this question. The obvious analogy is to the federal rule of *American Pipe*, wherein the running of the statute of limitations was suspended as to both named and unnamed class members. Defendants argue, however, that *American Pipe* cannot be used here because plaintiffs have resisted that part of the *American Pipe* rule that provides for suspension and have instead insisted that the statute of limitations run anew.

To the extent that defendants make an estoppel argument, we reject it, but the substance of their argument bears further consideration. Application of state tolling rules to § 1983 claims is required by 42 U.S.C. § 1988, *Board of Regents* v. *Tomanio*, 446 U.S. at 484-85; *Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978), unless the state rules are inconsistent with the federal policy underlying § 1983. *Board of Regents* v. *Tomanio*, 446 U.S. at 485-86; *see Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975) (same as to § 1981 claims). Thus in a § 1983 case, the federal rule and underlying reasoning of *American Pipe*, are not generally applicable. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. at 466-67. *But see Morton* v. *Charles County Bd. of Educ.*, 373 F. Supp. 394, 396 (D. Md.

1974), *aff'd on other grounds*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975) (under *American Pipe*, § 1983 class action tolled limitations period for all class members). In the instant case, though, there is no discernible state rule. Moreover, Puerto Rico has modeled its class action procedure, P.R. Laws Ann. tit. 32, App. II, R. 20.1, on the federal class action procedure. *Caguas Lumber Yard, Inc.* v. *Superior Court*, 96 P.R.R. 826, 830 (1969). Because the decision in *American Pipe* that unnamed class members could take advantage of the tolling effect of a pending class action was based on an interpretation of the federal class action rule, Fed.R.Civ.P. 23(a), *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. at 550-52, we believe that this reasoning would also be applied in determining the relationship between class actions and tolling rules in Puerto Rico. We conclude that named and unnamed plaintiffs may benefit from the tolling effect of a class action, if class certification is later denied on grounds of lack of numerosity. *Cf. id.* at 552-53.

This conclusion answers only half of the question. The issue remains whether *American Pipe* or other reasons require that unnamed ciass members gain the benefit only of suspension of the running of the limitations period, notwithstanding the Puerto Rican rule that the statute starts to run anew under similar circumstances. In *American Pipe*, the pendency of the class action suspended the running of the limitations period because the statute providing the underlying cause of action, section 5(b) of the Clayton Act, provided for suspension where the government filed suit under the statute. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. at 560-61. In this case, neither § 1983 nor any of the related Civil Rights Acts provisions suggest the precise effect that commencement of a class action or any other action should have. It is true that "in the American common law generally, prior judicial actions do not toll the statute of limitations, no matter how close their relationship to the one at bar." *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d at 319 (citations omitted). Puerto Rico has not adopted the American common law, however, and we see no reason not to apply its running anew rule to unnamed plain-

tiffs. None of the parties has pressed on us an argument that the federal policies underlying § 1983 require a particular result here, *see Board of Regents* v. *Tomanio*, 446 U.S. at 485-86, and we can discern no particularly strong policies implicated. Two policies often associated with § 1983 and tolling rules are those or repose and federalism. *See Williams* v. *Walsh*, 558 F.2d 667, 674-75 (2d Cir. 1977). In this case, the class action—assuming that it itself was timely filed, a matter we discuss below—did not disturb any protected repose defendants enjoyed with respect to § 1983 claims, and commencement of a new limitations period after the pendency of the class action would not interrupt any further repose. In addition, defendants are Puerto Rican, and there is no unfair surprise in following Puerto Rican law. The policy of federalism also appears to be well served: Puerto Rican law is permitted its fullest effect without any visibly adverse impact on federal rights. We hold, therefore, that a class action asserting a § 1983 claim tolls the Puerto Rican statute of limitations during the pendency of the class action for all purported class members and that when class certification is denied for lack of numerosity, the limitations period begins to run anew.

**The Retroactivity of *Delaware State College* v. *Ricks***

We now turn to the two remaining arguments on tolling, keeping in mind that the one-year statute of limitations was tolled by the filing of the class action on June 19, 1978, and started running anew when the class certification was denied on August 21, 1978. Success on the contention that the Supreme Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250, should not be applied retroactively would save all suits, so we now examine that. Defendants in *Fumero Soto* argue that the decision in *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341, controls this issue and requires retroactivity because the facts in that group of cases involved the same alleged incidents of political discrimination as the *Fumero Soto* cases do. Nothing is said in the *Rivera Fernandez* opinion

regarding retroactivity.[7] We do not think that the retroactivity question is therefore foreclosed.

The application of nonretroactivity depends on an evaluation of

> three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g.*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, [392 U.S. 481,] 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g.*, *Allen* v. *State Board of Elections*, [396 U.S. 544,] 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker*, [381 U.S. 618,] 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma*, [395 U.S. 701,] 706.

*Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971). *See Aufiero* v. *Clarke*, 639 F.2d 49, 51 (1st Cir.), *cert. denied*, 452 U.S. 917 (1981). In analyzing *Chevron Oil's* first factor, plaintiffs direct us to several cases purportedly standing for the proposition that a § 1983 cause of action accrues when plaintiff is actually demoted or terminated. The weight of authority is

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[7] In further asserting the conclusive effect of *Rivera Fernandez*, defendants argue that the Supreme Court denied the *Rivera Fernandez* plaintiffs' petition for rehearing, which raised the nonretroactivity issue. Defendants' argument is utterly without merit because surely the denial of a petition for rehearing can have no greater precedential effect than the denial of a petition for certiorari, which is to say none. *See Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of certiorari).

far less than plaintiffs suggest. One of the cases cited stands essentially for the *Ricks* rule of accrual rather than for plaintiffs' asserted rule, *NLRB* v. *California School of Professional psychology*, 583 F.2d 1099, 1101-02 (9th Cir. 1978) (applying § 10(b) of National Labor Relations Act); *accord*, *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873, 882 (2d Cir. 1977), three cited cases stand equally well for the *Ricks* rule as for plaintiffs' rule, *Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) (Age Discrimination in Employment Act); *Payne* v. *Crane Co.*, 560 F.2d 198, 199 (5th Cir. 1977) (per curiam) (same Act); *Fitzgerald* v. *Seamans*, 553 F.2d 220, 226-31 (D.C. Cir. 1977) (42 U.S.C. § 1985(3)), two are at best suggestive of plaintiffs' proposition, as we observed in *Rivera Fernandez* v. *Chardon*, 648 F.2d at 768, *Bonham* v. *Dresser Industries, Inc.* 569 F.2d 187, 192 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) (Age Discrimination in Employment Act); *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 95 (8th Cir. 1975) (same Act), and only one offers square support for plaintiffs' rule, *Egelston* v. *State Univ. College at Geneseo*, 535 F.2d 752, 755 (2d Cir. 1976) (Title VII). Moreover, despite the Second Circuit's decision in *Egelston*, the Fourth Circuit reached a contrary conclusion in December, 1977, *Bireline* v. *Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979). It is true that, as of the summer of 1977, little law existed regarding the accrual date of a § 1983 cause of action, but the one established principle was that a civil rights cause of action accrued when plaintiff knew or had reason to know of his or her injury, *see*, *e.g.*, *Cox* v. *Stanton*, 529 F.2d 47, 50 (4th Cir. 1975); 1 C. Antieau, Federal Civil Rights Acts § 241, at 412 (2d ed. 1980), which could support either the *Ricks* rule or plaintiffs' rule.*

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* This observation relates to the question whether in a retroactivity analysis, we should focus on the state of the law at the time the claim arose, *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342, 347 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), or on the state of the law when the new decision

We cannot say that *Ricks* established a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression. *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106.

The second factor bearing on nonretroactivity involves examining " 'the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " *Chevron Oil Co.* v. *Huson*, 404 U.S. at 107, quoting *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965). *Linkletter* restated the inquiry as one into the purpose of the new rule, reliance placed on the old rule, and the effect of retroactivity on the administration of justice, *Linkletter* v. *Walker*, 381 U.S. at 636. The inquiry has also been construed more simply as the last clause of the *Chevron Oil* factor: whether retroactive application will further or retard operation of the rule, *Wiltshire* v. *Standard Oil Co.*, 652 F.2d 837, 841 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3766 (Mar. 22, 1982). However stated, this test for the retroactivity of a rule of law requires an explanation of the purposes of the new rule and consideration of its impact on the prior law, which thereby make this test dependent on the first factor: the less (or the less clear) prior law, the less adverse impact there would be, and this would militate against retroactivity. The accrual rule of *Ricks* seems to promote more strongly the policy of repose that underlies the applicable state statute of limitations. The policy of repose is that a defendant can be expected to defend a suit only for a certain period after the act complained of. The period of susceptibility to suit should begin when the defendant is first aware (or should be aware) of facts that give rise to the concrete possibility of suit. A competing policy is that a limitations period should not begin to run against a plaintiff until he is or

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comes out. We intimate no views on whether we agree with *Wachovia Bank*. That opinion would provide a stricter test for retroactivity here; we think that under *Wachovia* the "new" law was clear at the time plaintiffs' claims arose.

should be aware of the actionable conduct. Under *Ricks* these policies are reconciled as follows: the crux of a § 1983 action is a discriminatory act, and in an employment case, this act occurs—and the limitations period begins to run—when notice of termination or demotion is given, not when the firing or demotion actually takes effect. Retroactive application of *Ricks* would give greater protection to defendants' repose without unduly limiting plaintiffs' ability to sue. Moreover, given the at best unsettled state of the law on accrual before *Ricks*, retroactive application would not disrupt expectations of either party. There would also seem to be little impact on the administration of justice whether or not *Ricks* is applied retroactively. The second test of *Chevron Oil* thus does not require nonretroactivity.

We might still find retroactivity barred if it would produce substantially inequitable results, the third *Chevron Oil* factor. This factor reflects concern that a plaintiff not be accused of "sleeping on his rights" when he could not have known of restrictions on his rights, *Chevron Oil Co.* v. *Huson*, 404 U.S. at 108, and that injustice or hardship not be caused, *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) (per curiam). The equities that the *Fumero Soto* plaintiffs rely on are their day in court to vindicate their right to freedom from political discrimination, the existing jury finding of liability on the part of the defendants, and the expenses already incurred at trial. Neither group of plaintiffs advance any reason, however, as to why they waited so long before filing suit, thereby risking a time bar if the date of notice of demotion were to become the accrual date. The then-existing law was not at all clear on this point. The right plaintiffs seek to enforce is not so important that limitations periods should be disregarded. The expenditure of time and energy in the *Fumero Soto* case is regrettable, but the limitations problem had been recognized before the case was tried on its merits. We are unpersuaded that equity requires *Ricks* to be applied prospectively only, and we hold that *Ricks* applies retroactively.

**The Tolling Effect of the Letters of Protest**

We now turn to the argument that letters sent by the plaintiffs in both cases to Chardon and the Department of Education protesting their demotions constituted "extrajudicial claim[s] of the creditor[s]" within the meaning of P.R. Laws Ann. tit. 31, § 5303, which thereby tolled the limitations period and caused it to run anew. We have held that such extrajudicial claims must be "precise and specific" in order to have this desired tolling effect. *Gual Morales* v. *Hernandez Vega*, 604 F.2d 730, 733 (1st Cir. 1979), citing, *Jiminez* v. *District Court*, 65 P.R.R. 35, 42 (1945). A proper extrajudicial claim must seek the same relief ultimately sought in the subseqent lawsuit. *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d 321, 323-24 (1st Cir. 1978). Plaintiffs believe that their protest letters satisfied these conditions. If they do not, however, they urge us to reconsider *Gual Morales* and *Hernandez del Valle* for the following three reasons: the Supreme Court's recent decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478, requires modification of our decisions; Puerto Rican law treats "extrajudicial claim" more liberally than do our decisions; and *Hernandez del Valle* erroneously used federal law in construing "extrajudicial claim" restrictively. Alternatively, they request that we certify to the Puerto Rico Supreme Court the question of the tolling effect of the protest letters.

The *Rivera Fernandez* and *Fumero Soto* plaintiffs sent virtually identical letters of protest to Chardon in which each plaintiff acknowledged receipt of his demotion letter, stated his disagreement with the decision, informed Chardon that he had sent a copy of the demotion letter to the Puerto Rico Teachers Association to take appropriate action, and said he would obey the order.[8] These letters did not make a "precise and specific" claim for the relief ultimately sought. The plaintiffs later sought reinstatement, back pay, actual and punitive damages, costs and attorney's fees, and a permanent injunc-

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[8] See footnote 2 for the verbatim text of the letters.

tion against defendants from any further acts of political discrimination. None of these claims were asserted in the letters; the letters allude only to necessary legal action. This warning does not serve the purpose of a "precise and specific" claim, alerting defendants to still-live claims that would otherwise lapse. These letters are in the nature of a mere reminder, not a claim, *see Diaz de Diana* v. *A.J.A.S. Ins. Co.*, ___ P.R.R. ___ (1980), and do not come within § 5303.[9]

We also decline the invitation to reconsider *Gual Morales* and *Hernandez del Valle*. The three reasons advanced for reconsideration tend to merge. The first reason, the *Tomanio* case, which held that state tolling law applies to the state statute-of-limitations questions that arise in a § 1983 case, is said to require reconsideration because our earlier decisions incorrectly interpreted Puerto Rican law—the second reason for reconsideration—and because those decisions improperly took federal law into account—the third reason. We cannot and do not, of course, dispute *Tomanio*, but we do not believe that *Gual Morales* and *Hernandez del Valle* violated its guidelines. Puerto Rican law does not, contrary to the plaintiffs' assertions, require a wider construction of "extrajudicial claim." Our decision in *Hernandez del Valle* relied on two Commonwealth Supreme Court cases and one federal district court case from Puerto Rico. *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323-24. In addition, the Puerto Rico Supreme Court recently observed that, because the "extrajudicial claim" provision of § 5303 constituted an exception to the extinguishment of actions, it should be construed narrowly. *Diaz de Diana* v. *A.J.A.S. Ins. Co.*, ___ P.R.R. at ___ & n.1. The commentators cited by plaintiffs, Diez-Picazo, La Prescripcion En El Codigo Civil 93-95, 130-31; 12 Manresa, Codigo Civil 1242-43 (1973), do not appear to urge a different interpretation. Diez-

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[9] We have no occasion to consider defendant Ramos's contention that, because the letters were sent to Chardon at the Department of Education, Ramos never received them so that they could not in any event constitute extrajudicial claims as to him.

Picazo does state (in translation) that no particular form is required for an extrajudicial claim but goes on to discuss summonses, letters, and oral claims, matters of form not at issue here. We do not think that we have construed Puerto Rican law improperly.

Nor has federal law been read erroneously into § 5303. Plaintiffs object in particular to a passage in *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323, that states that expansion of "extrajudicial claim" beyond interpretations given by courts in Puerto Rico would undermine the policy of repose underlying statutes of limitation. Plaintiffs' argument is essentially that "policy of repose" is a common law concept that cannot be used in construing the civil code. The commentary concerning tolling that is cited by plaintiffs, Diez-Picazo, *supra*, and Manresa, *supra*, is certainly not inconsistent with the policy of repose, but in any case, it is clear that our decisions in *Hernandez del Valle* and *Gual Morales* rested primarily on a fair reading of Puerto Rican decisions. *Gual Morales* v. *Hernandez Vega*, 604 F.2d at 733; *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 223-24. Plaintiffs also refer us to *Miller* v. *Smith*, 625 F.2d 43 (5th Cir. 1980) (per curiam), and *Brown* v. *Bigger*, 622 F.2d 1025 (10th Cir. 1980) (per curiam), for support for their position here. *Miller* simply reversed and remanded for reconsideration in light of *Tomanio*, a decision with which we already conform; *Brown* v. *Bigger* is to similar effect and does not persuade us to alter our conclusion.

The plaintiffs ask us alternatively to certify to the Puerto Rico Supreme Court the question of the tolling effect of the protest letters. Certification is a matter within the discretion of the court. *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). It is particularly appropriate where a novel and unsettled question of state law is involved, and where the judges on the federal bench are geographically distant from that state or are otherwise unfamiliar with its law. *See id.* at 391; *Gual Morales* v. *Hernandez Vega*, 604 F.2d at 732-33; *Ruiz Rodriguez* v. *Litton Industries Leasing Corp.*, 574 F.2d 44, 46 (1st Cir. 1978). Among other functions, certification is meant to save

"time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros.* v. *Schein*, 416 U.S. at 391.

The cases at bar do not involve a matter of first impression in Puerto Rican law, *cf. Hendrickson* v. *Sears*, 495 F.2d 513, 514 (1st Cir. 1974) (per curiam) (certification of "question of first impression in Massachusetts law"); *Bose Corp.* v. *Consumers Union, Inc.*, 384 F. Supp. 600, 603 (D. Mass. 1974) (same), nor an issue where the law is unsettled, *cf. Hiram Ricker & Sons* v. *Students Internat'l Meditation Soc'y*, 501 F.2d 550, 557-58 & n.16 (1st Cir. 1974) (certification where extension of prior Maine decisions was uncertain). The principle that an "extrajudicial claim" must be "precise and specific," *Jiminez* v. *District Court*, 65 P.R.R. at 42, that it must seek the same relief later sought in court, *Gual Morales* v. *Hernandez Vega*, 604 F.2d at 732-33; *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323-24, has already been clearly laid down. We decline, therefore, to certify the issue to the Puerto Rico Supreme Court. *See Daigle* v. *Hall*, 564 F.2d 884, 886 (1st Cir. 1977) ("not particularly difficult" issue of state law does not require certification); *Oppenheimer Mendez* v. *Acevedo*, 512 F.2d 1373, 1375 (1st Cir. 1975) (where Puerto Rico law is clear, certification would be "hollow formality"). In every case, certification would help "build a cooperative judicial federalism," *Lehman Bros.* v. *Schein*, 416 U.S. at 391, by deferring to state courts, but the waste of time and energy in certifying the issue of "extrajudicial claim" here would be too great, *see id.*

Our ruling that the Ortiz Rivera class action tolled the statute of limitations during its pendency and caused it to run anew means that those *Fumero Soto* plaintiffs who received notice of termination within one year before the class action was filed, that is, after June 19, 1977, are not time-barred. The date of notice of termination is the triggering date under *Ricks* and *Rivera Fernandez*, not the protest letters. The *Fumero Soto* plaintiffs who received notice of termination before June 19, 1977, are time-barred. All the *Rivera Fernandez* plaintiffs received notice prior to June 19, 1977, and all those cases are time-barred.

**The Verdict and the Subsequent Order of the District Court**

There are four issues pertaining to the *Fumero Soto* plaintiffs who are not time-barred: whether the district court should have granted defendants' motion for judgment notwithstanding the verdict, Fed.R.Civ.P. 50(b); whether the general verdict should have been set aside because the answers to the special interrogatories were inconsistent with it, Fed.R.Civ.P. 49(b); whether the court erred in ordering the Commonwealth to make payments of back pay to plaintiffs; and whether the court erred in holding that the individual defendants should not pay damages.

To determine the sufficiency of the evidence, it is necessary first to set out the law concerning § 1983 liability. Liability may be grounded on negligence alone. *Parratt* v. *Taylor*, 451 U.S. 527, 532-35 (1981).

> Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

*Id.* at 535. The first element raises several issues, among them whether there is a sufficient causal connection between defendant's acts and the alleged injury. There is also a related, though strictly extraneous issue, whether defendant enjoys immunity from damages, which we discuss below concerning the remedy in the instant cases. With respect to causality, there usually must be an affirmative link between acts of misconduct and plans or policies promulgaged by the defendant, *Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976); defendant must commit the constitutional tort himself or "cause" another to commit the tort, *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 692 (1978). Defendant will be liable for failures to meet his statutory responsibilities that amount to constitutional violations, *DiMarzo* v. *Cahill*, 575 F.2d 15, 17-18 (1st Cir.), *cert. denied*, 439 U.S. 927 (1978), and actual knowl-

edge of the resulting violations is unnecessary. *Id.* at 18 & n.3; *Tatum* v. *Houser*, 642 F.2d 253, 254 (8th Cir. 1981) (per curiam). Plaintiff may prove that defendant was derelict in supervising a subordinate whose acts caused constitutional injury. Such supervisory liability is ill-defined. *See Naughton* v. *Bevilacqua*, 605 F.2d 586, 589 (1st Cir. 1979). A superior will not be liable for undirected, sporadic acts of subordinates, *Layne* v. *Vinzant*, 657 F.2d 468, 471 & n.3 (1st Cir. 1981), but he will be liable where violations are so pervasive that a dutiful supervisor would have notice of them, *Naughton* v. *Bevilacqua*, 605 F.2d at 589. Mere failure to supervise is not a basis for liability under § 1983, *Owens* v. *Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979), citing *Rizzo* v. *Goode*, 423 U.S. 362, but if delinquent supervision is so severe as to amount to gross negligence or deliberate indifference to constitutional violations, then liability will result, *Owens* v. *Haas*, 601 F.2d at 1246. "Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978)." *Polk County* v. *Dodson*, 50 U.S.L.W. 4077, 4080 (Dec. 14, 1981).

The evidence, viewed in the light most favorable to the plaintiffs, showed the following. In early May, 1977, a memorandum was sent out over the signature of Virginia Belaval, an assistant to Chardon, to undersecretaries, deputy secretaries, and regional directors in the Department, informing them that nonpermanent positions in the Department would be filled by competition for the 1977-78 school year and that recommendations for retaining current non permanent employees should be sent with "appropriate justifications." Ramos and others actually prepared the memorandum, basing it on similar memoranda sent out at this time in earlier years. Chardon saw the memorandum and discussed it with Belaval. Some recommendations were received. At the end of May, Ramos ordered Julio Cintron Lopez to sign letters of demotion that were going to "clean out" members of the PDP in temporary positions. Cintron Lopez resisted but eventually complied; thereafter he was excluded from activities in the Department. At some

point, probably in the summer, Chardon saw some of the letters. The letters had the desired cleaning-out effect: the demoted plaintiffs were members of the PDP or unaffiliated with the NPP; they were replaced by NPP members. In particular, one regional director told Jose Surillo Rodriguez that he was being demoted because the NPP wanted to place its own member in his position but that Surillo Rodriguez could seek reappointment if he were willing to cooperate with the NPP. When the demoted teachers returned protest letters, Belaval heard their complaints, conducted brief investigations, and discussed some cases with Chardon. Chardon instructed Belaval, however, that unless she could persuade the regional directors to change their recommendations, their decisions would stand. At some time during his tenure as Secretary, Chardon spoke to a group of deputy superintendents and school principals. He was asked about the changes and demotions that had occurred in the Department, and he remarked that the PDP had left a great many "vacuums" or vacancies and that the NPP would take care that PDP members would not fill them. Chardon testified that he was referring only to 300 school director positions that were truly vacant at the time.[10]

This evidence is less than overwhelming, but we believe that it was sufficient to enable the jury to conclude that Chardon and Ramos had the necessary causal connection—or, as Chardon and Ramos put it, "personal involvement"—with the demotions to render themselves liable. Chardon is the more difficult case. He testified about his inability to control employees of the Department, and there was evidence about the Department's "decentralization policy:" accepting the decisions of local (and otherwise inferior) officials as final. The critical evidence was Chardon's statement that the NPP would

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[10] Plaintiffs argue incorrectly that evidence available to the jury included defense counsel's "concession" that certain testimony "tied Chardon . . . into the personal involvement pattern." Statements of counsel are not evidence; plaintiffs' more egregious error is that the jury was not in the courtroom at the time the statement was made.

keep the PDP out of Department positions; the jury was entitled to credit Rivera Fernandez's testimony over Chardon's about the statement. From this, the jury could have concluded that Chardon avoided making changes in or interfering with Department activities that, under the prevailing policies, he knew would operate to demote employees on the basis of their political affiliation. *See Rizzo* v. *Goode*, 423 U.S. at 371 (need for affirmative link between misconduct and policies implemented by defendants). This is not a case of "the mere right to control without any control or direction having been exercised and without any failure to supervise." *Monell* v. *Department of Social Servs.*, 436 U.S. at 694 n.58.

The case against Ramos is stronger: he took charge of dispatching the demotion letters that he knew would "clean out" PDP members. The jury could have characterized his conduct as an act that directly caused constitutional injury to the plaintiffs.

We affirm the district court's denial of defendants' motion for judgment notwithstanding the verdict.

The next issue, the alleged inconsistency between the answers to the special interrogatories and the general verdict, requires an examination of the court's instructions to the jury. We have no difficulty with the instructions, to which no objections were made. It is necessary, however, to restate certain sections of the charge in order to understand the inconsistency claim and our ruling on damages.

The district court instructed the jury that one of the essential facts plaintiffs had to prove was

> that the defendant demoted him from the position that he held during the '76-'77 school year because of his political affiliation and of his activity in the affairs of the Popular Democratic Party or the—a political party other than the NPP.
>
> In other words, that plaintiff's political affiliation or activity in the affairs of his party was a substantial and/or

> motivating factor in the defendant's decision to demote him back to his permanent status[.]

On the question of immunity, the court instructed:

> The Commonwealth officials who are defendants in this case are not immune from liability for actions taken under Section 1983 if that official knew or should have known that the action taken within his sphere of official responsibility would violate the Constitutional or legal rights of the teachers affected, *or* if the official took the action with the malicious intention of causing a deprivation of Constitutional or legal rights or other injury to the teachers. (emphasis added).

After the case was submitted to the jury, there was a lengthy discussion between the court and counsel as to how damages would be handled if the jury found liability. The court was concerned because "we have got 55 cases, and it is beyond physical endurance for that same jury to come back and try 55 damage trials." During the discussion, the court opined "that there must be a finding of malicious intention to justify punitive damages." Counsel ultimately agreed, with the court's approval, that in the event the jury found defendants liable "that a new or second jury can be summoned to try the respective damages claims." The record does not disclose any discussion of special interrogatories.

After the general verdict was received, the court told the jury that it wanted it to determine "whether or not these acts were done with a malicious intent." It then defined malicious intent:

> Malice is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury or under circumstances that the law will imply an evil intent.
>
> Maliciousness does not necessarily mean actual malice or ill-will, but intentional doing of a wrongful act without legal or social justification.

The jury was then told to answer the following questions as to each defendant. "Did the defendant have a malicious intent to deprive defendants of their constitutional or other rights?"

There was no objection. The jury answered in the negative as to both defendants and was then discharged. Immediately after the jury left, counsel for the defendants moved for judgment notwithstanding the verdict "pursuant to Federal Rule 52(b)" on the ground that the special findings contradicted the general verdict.

It is Federal Rule of Civil Procedure 49(b) that covers the problem of inconsistencies between special interrogatories and the general verdict. Federal Rule of Civil Procedure 52(b) applies only where findings are made by the court in the first instance. The use of special interrogatories should have put counsel on notice that the provisions of Federal Rule of Civil Procedure 49 applied. Under Rule 49(b),[11] objections to the inconsistency of verdicts must be made before the jury is discharged or by motion to resubmit to the jury. *Skillen* v. *Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981); *see Stancill* v. *McKenzie Tank Lines, Inc.*, 497 F.2d 529, 534-35 (5th Cir. 1974); *Ludwig* v. *Marion Laboratories, Inc.*, 465 F.2d 114, 118 (8th Cir. 1972); *Barnes* v. *Brown*, 430 F.2d 578, 580 (7th Cir. 1970). The purpose of the rule is plain: to promote the efficiency of trials by allowing the original deliberating body to reconcile inconsistencies without the need for a new presentation of evidence to a different body. *Skillen* v. *Kimball*, 643 F.2d at 20. In the case at bar, counsel waited until after the jury was excused before raising the inconsistency claim. Defendants have, therefore, waived their right to have the general verdict set aside on this ground.

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[11] Fed.R.Civ.P. 49(b) provides in pertinent part as follows:

> *General Verdict Accompanied by Answer to Interrogatories.*
>
> . . . When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

Even had defendants not waived their inconsistency claim, we would agree with the district court that the general verdict and the answers to the special interrogatories were not inconsistent. It is clear from reading the record that the district court submitted these questions to determine if punitive damages should be awarded. As the district court pointed out in its lengthy post-trial memorandum, the jury could have based its general verdict of liability on the ground that the defendants knew or should have known that their actions would violate the constitutional or legal rights of the teachers *or* that they acted with malicious intent. Immunity Instruction, *supra*, at 25. We agree with the district court that the only effect of the answers to the special interrogatories was to rule out punitive damages.

We now come to the post-trial order of the district court. In rejecting defendants' motion for judgment notwithstanding the verdict, the court issued two orders. It directed the Department of Education of the Commonwealth to reinstate all plaintiffs to the positions held at the time of their demotions. This order has been neither briefed nor argued on appeal. The court also ordered the Department of Education to pay all plaintiffs full back pay. The court then ruled that "as a matter of law and in light of the jury's factual finding that the defendants did not have a malicious intent to deprive plaintiffs of their rights, the relief herein granted exhausts the remedies and damages available to plaintiffs." Although we can understand the court's desire to dispatch the case in one fell swoop, we think the ruling was erroneous.

We turn first to the back pay award: whether the Commonwealth could be liable for it.[12] We are guided in answering the

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[12] The district court denied defendants' motion to amend the judgment by vacating or rescinding the back pay award on the ground that the motion was untimely. We are not, however, foreclosed from considering defendants attack on the judgment. *See Evans* v. *Suntreat Growers & Shippers, Inc.*, 531 F.2d 568, 570 (Temp. Emer. Ct. App. 1976).

first question by P.R. Laws Ann. tit. 32, § 3085, which provides as follows:

> Every official, ex-official, employee or ex-employee of the Commonwealth of Puerto Rico who is sued for damages in his personal capacity, when the cause of action is based on alleged violations of the plaintiff's civil rights, due to acts or omissions committed in good faith, in the course of his employment and within the scope of his functions, may request the Commonwealth of Puerto Rico to provide him with legal representation, and to subsequently assume the payment of any judgment that may be entered against his person. Executive Directors, ex-Executive Directors, members and ex-members of the Governing Boards of public corporations and Government instrumentalities, mayors and ex-mayors shall be covered by these provisions, except that for the payment of judgments, they shall be governed by the provisions of section 3092 of this title. Any action brought under the provisions of sections 3077-3084 of this title shall not be covered by the provisions of this section.
>
> Likewise, these provisions shall not be construed, for any reason whatsoever, as making the Commonwealth an insurer of the aforesaid public services, nor as a waiver of the sovereign immunity of the Commonwealth.

Puerto Rico not having waived its sovereign immunity, the award against its Department of Education cannot stand.[13] In a § 1983 action, "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury." *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974). *See Quern* v. *Jordan*, 440 U.S. 332, 341 (1979); *Fitzgerald* v. *Bitzer*, 427 U.S. 445, 452 (1976). The district court concluded that the back pay award in the *Fumero Soto* cases was nevertheless permissible because it was "ancillary" to the

---

[13] The Commonwealth enjoys the full benefits of the eleventh amendment. *Ezratty* v. *Commonwealth of Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981).

prospective relief of reinstatement. We cannot agree. The back pay and reinstatement remedies are entirely distinct; indeed, plaintiffs no longer with the Department of Education and not reinstated were held entitled to back pay. It is plainly retroactive relief requiring the payment of funds from the state treasury. Moreover, "ancillary" monetary relief that is appropriate against a state, *Quern* v. *Jordan*, 440 U.S. at 337, is far different from the relationship between back pay awards and other equitable relief that justifies a grant of back pay against bodies that do not enjoy sovereign immunity, *see Gurmankin* v. *Costanzo*, 626 F.2d 1115, 1121-22 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (approving back pay award as part of remedy in § 1983 and Title VII case) and cases cited therein. It was on this second, looser relationship that the district court erroneously relied.

Plaintiffs argue that the eleventh amendment proscription does not apply where a state may use federal funds to pay damages. The cases cited are instances where the state could seek reimbursement from the federal government, *Harrington* v. *Blum*, 483 F. Supp. 1015, 1021-22 (S.D.N.Y. 1979), *aff'd*, 639 F.2d 768 (2d Cir. 1980), where a back pay award is at issue and the state job position was federally funded, *Witter* v. *Pennsylvania Nat'l Guard*, 462 F. Supp. 299, 306 n.9 (E.D. Pa. 1978), or where state funds are held in a separate account for an historical society and an award limited to those funds will not affect the state's budgetary decisions, *Morrow* v. *Sudler*, 502 F. Supp. 1200, 1203-04 (D. Colo. 1980). These decisions are arguably sound: where the state will be unaffected by an award, its consent to suit and waiver of sovereign immunity seem unncessary. These decisions, however, do not reach the instant cases where plaintiffs show that at most state and federal funds are intermingled. *Cf. Florida Dep't of Health & Rehabilitation Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam) (state participation in federally funded public aid program does not amount to waiver of sovereign immunity). The Commonwealth here cannot avoid using state funds to pay the award, and its budget will be

affected. We, therefore, hold the back pay award against the Department of Education barred by the eleventh amendment.

The final issue is the court's ruling that because of the jury finding of lack of malicious intent, plaintiffs were not entitled to any damages from Chardon and Ramos. Unlike most civil rights damage cases, the individual defendants here never asserted a good faith defense. Their defense was that the demotions were for nonpolitical reasons. The district court pointed this out in its post-trial memorandum, and our review of the record confirms its finding. There is, therefore, no question of immunity, absolute or qualified, to be considered. We think the district court's ruling that lack of malice precluded compensatory damages was incorrect. The instructions to the jury, already quoted, and its general verdict rendered the defendants liable for compensatory damages. In *Wood* v. *Strickland*, 420 U.S. 308 (1975), the seminal § 1983 civil rights case on damages against individual defendants, the Court held:

> [T]he appropriate [immunity] standard necessarily contains element of both ["objective" and "subjective" good faith]. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students daily lives than by the presence of actual malice.

*Id.* at 321.

Here, the defense was neither good faith nor ignorance; defendants simply claimed that they did not violate the law. The jury found otherwise. Compensatory damages follow as a matter of course. Denial of punitive damages because of lack of malicious intent is no bar to liability for compensatory damages on the part of defendants who cannot survive the "ignorance or disregard" prong of the *Wood* test. *Cf. Morris* v. *Travisono*, 528 F.2d 856, 857 (1st Cir. 1976) (noting unappealed award of compensatory damages against three defendants but punitive damages against only two); *Smith* v. *Losee*, 485 F.2d 334, 344 (10th Cir. 1973) (in banc), *cert. denied*, 417 U.S. 908 (1974) (defendant indirectly responsible for political discrimination

by other defendants against plaintiff is liable for actual damages but not for punitive damages); *Stolberg* v. *Members of Bd. of Trustees for State Colleges*, 474 F.2d 485, 489 (2d Cir. 1973) (actual but not punitive damages awarded in political discrimination case); *Aumillier* v. *University of Delaware*, 434 F. Supp. 1273, 1311-12 (D. Del. 1977) (against defendant official who cannot invoke qualified immunity plaintiff must still prove malice or wanton disregard of constitutional rights in order to recover punitive damages).

The *Fumero Soto* cases not time-barred must be remanded for a jury trial on compensatory damages.

**Summary**

In Nos. 80-1237, *et al.*, *Rafael Rivera Fernandez et al.* v. *Chardon, et al.*, the judgments are vacated and all the cases are remanded to the district court with instructions to dismiss.*

In Nos. 81-1567 and 81-1607, *Juan Fumero Soto, et al.* v. *Chardon, et al.*, the liability judgment in favor of those plaintiffs who received letters of notice of demotion after June 19, 1977, is affirmed and the matter is remanded for assessment of compensatory damages against the individual defendants, Chardon and Ramos. This is a jury determination unless the parties agree otherwise. The judgment in the cases in which the plaintiffs received letters of demotion prior to June 19, 1977, is reversed and the matter is remanded with instructions to dismiss.

No costs to any party.

**Judgments accordingly.**

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* Judges Campbell and Breyer, not having participated in 81-1567 and 81-1607, join in only so much of the opinion as relates to 80-1237.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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**No. 81-1567.**

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JUAN FUMERO SOTO,
*Plaintiff, Appellee,*

v.

CARLOS CHARDON, ETC., *et al.*,
*Defendants, Appellants.*

---

**No. 81-1607.**

---

JUAN FUMERO SOTO, *et al.*,
*Plaintiffs, Appellants,*

v.

CARLOS CHARDON, ETC., *et al.*,
*Defendants, Appellees.*

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**JUDGMENT**

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**Entered: June 8, 1982**

These causes came on to be heard on appeals from the United States District Court for the District of Puerto Rico, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The liability judgment in favor of those plaintiffs who received letters of notice of demotion after June 19, 1977, is affirmed and the matter is remanded for assessment of compensatory damages against the individual defendants, Chardon and Ramos. This is a jury determination unless the parties agree otherwise. The judgment in the cases in which the plaintiffs received letters of demotion prior to

June 19, 1977, is reversed and the matter is remanded with instructions to dismiss.

No costs to any party.

By the Court:

Clerk.

[cc: Messrs. Nadal Arcelay, Nahmod, Cordova, Mss. Worthy and Eguia Miranda]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Nos. 81-1567
81-1607

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JUAN FUMERO SOTO, *et al.*,
*Plaintiffs-Appellees-Cross-Appellants,*

v.

CARLOS CHARDON, ETC., *et al.*,
*Defendants-Appellants-Cross-Appellees.*

---

By Coffin, *Chief Judge,*
Gibson,* *Senior Circuit Judge,*
Bownes, *Circuit Judge.*

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ORDER OF COURT

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**Entered: July 6, 1982**

The petition for modification of judgment by plaintiffs-appellees and cross-appellants is granted. Those plaintiffs who received their letters of demotion on June 17, 1977, or thereafter are not time-barred. The last two lines on page 31 of the slip opinion and the first two lines on page 32 should be changed to read as follows:

> In Nos. 81-1567 and 81-1607, *Juan Fumero Soto, et al.* v. *Chardon, et al.*, the liability judgment in favor of those plaintiffs who received letters of notice of demotion on June 17, 1977, or thereafter is affirmed, etc.

By the Court:

DANA H. GALLUP,
Clerk.

/s/ By: FRANCIS P. SCIGLIANO
Francis P. Scigliano
Chief Deputy Clerk.

*Of the Eighth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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**Nos. 81-1567**
**81-1607**

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JUAN FUMERO SOTO, *et al.*,
*Plaintiffs-Appellees-Cross-Appellants,*

v.

CARLOS CHARDON, ETC., *et al.*,
*Defendants-Appellants-Cross-Appellees.*

---

**By Coffin, *Chief Judge*,**
**Gibson,* *Senior Circuit Judge*,**
**Bownes, *Circuit Judge*.**

---

**ORDER OF COURT**

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**Entered: July 6, 1982**

The petition for rehearing by defendants-appellants and cross-appellees is denied for the following reasons. The district court found in ruling on defendants' motion for summary judgment as to Ortiz Rivera:

> The present type of cause of action accrues on the date Plaintiff is officially informed that he is being demoted and he is aware of the reasons for this demotion. It is at this point that there is present a "complete and present cause of action." *Rawlings* v. *Ray*, 314 U.S. 96, 98 (1948). In the present case this occurred on June 21, 1977. Therefore, a complaint filed on June 19, 1978 would be timely.

Joint Appendix at 73.

In arriving at this conclusion, the court considered plaintiff's sworn statement to the effect that he was orally informed on May 27, 1977, that he was going to be removed from his

position as school director and assigned to his permanent position of teacher. The court specifically found:

> First from the informal and unofficial information Plaintiff received in May, 1977 one could not conclude that Plaintiff lost all reasonable expectations that he would continue at his position. Second, and along the same lines from the informal conversation one cannot conclude that Plaintiff was in fact demoted or reassigned. Until he was informed officially Plaintiff had no reason to believe that he was demoted.

*Id.* at 72.

We do not think the district court erred in making this finding. In the case cited by defendants, *McWilliams* v. *Escambia County School Board*, 658 F.2d 326 (5th Cir. 1981), the district court found that the plaintiff reasonably knew prior to the critical date that his position was being changed. The court of appeals found that "the record contains ample evidence to support the district court's ruling." *Id.* at 328. This is the obverse of the fact situation in *McWilliams* but the same rationale applies.

We rule that, as with all the other plaintiffs, the statute of limitations started to run as to Ortiz Rivera on the day he received the official letter of demotion, which was on June 21, 1977. The class action was, therefore, timely filed.

The second argument in the petition, that *American Pipe* should control, was discussed thoroughly in defendants-appellants' brief and in our opinion. No new reasons have been advanced that persuade us we should change the opinion in this regard.

By the Court:

DANA H. GALLUP,
Clerk.

/s/ By: FRANCIS P. SCIGLIANO
FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

*Of the Eighth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Nos. 81-1567
81-1607

---

JUAN FUMERO SOTO, *et al.*,
*Plaintiffs-Appellees-Cross-Appellants,*

v.

CARLOS CHARDON, ETC., *et al.*,
*Defendants-Appellants-Cross-Appellees.*

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Before COFFIN, *Chief Judge,*
GIBSON,* *Senior Circuit Judge,*
and BOWNES, *Circuit Judge.*

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ORDER OF COURT

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**Entered July 28, 1982**

The motion of Chardon and Ramos, defendants-appellants, for stay of mandate pending application to the Supreme Court for a writ of certiorari is granted upon the condition that said application is filed by August 16, 1982, and the Clerk of this Court is given notice thereof.

The petition for rehearing on modification of judgment is denied. The date of filing is controlled by the Federal Rules and Federal Rules of Civil Procedure 6 expressly excludes from computation "a Saturday, a Sunday or a legal holiday" and Federal Rules of Appellate Procedure 26 contains the same exclusion.

By the Court:

/s/ DANA H. GALLUP
Dana H. Gallup
Clerk.

*Of the Eighth Circuit, sitting by designation.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

November 8, 1982

K. Martin Worthy, Esq.
Hamel, Park, McCabe & Saunders
888 - 16th Street, N.W.
Washington, D.C. 20006

RE: *Carlos Chardon, et al.* v. *Juan Fumero Soto, et al.*, No. 82-271

Dear Mr. Worthy:

The Court today entered the following order in the above case:

"The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition."

Enclosed are memorandums describing the time requirements and procedures under the rules. Please read them carefully.

I have been instructed to inform you that Rule 34(a) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not have printed on this page the title of the case or any other descriptive matter. A sample sheet is enclosed.

The additional docketing fee of $100, Rule 45(a), is due and payable.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

/s/ By JUNE M. HOFFMANN
(Miss) JUNE M. HOFFMANN
Assistant Clerk

Enclosures

Office - Supreme Court, U.S.
FILED
SEP 14 1982
ALEXANDER L. STEVAS,
CLERK

82-271

No.

IN THE
# Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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## COUNTER QUESTIONS PRESENTED

1. Where a federal appeals court with expertise in Puerto Rico civil law interprets and applies Puerto Rico's statutory tolling law to employment discrimination suits brought pursuant to 42 U.S.C. § 1983 and Puerto Rico law, should this Court defer to the interpretation of Puerto Rico statutory tolling law by the federal appeals court?

2. Where federal plaintiffs prevail on their claims of employment discrimination brought under both 42 U.S.C. § 1983 and Puerto Rico law, and where the tolling issue decided in their favor and the judgment as a whole can be upheld under Puerto Rico statutory tolling law as applied to the pendent Puerto Rico claims, should this Court exercise its certiorari jurisdiction to review a different tolling issue?

3. Where a federal district court finds as a factual matter for limitations purposes that a plaintiff in an employment discrimination suit received official notice of his demotion on a certain date and is therefore not time-barred, and where a federal appeals court in affirming this finding concludes that there was sufficient evidence on the record to sustain it, should this Court in the exercise of its certiorari jurisdiction further review this finding of fact?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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No.

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CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

---

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

---

### STATUTORY PROVISIONS INVOLVED

**18 L.P.R.A. § 249(e) (Puerto Rico)**

The School authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status.

**31 L.P.R.A. § 5303 (Puerto Rico)**

Prescription of actions is interrupted by their institution before the courts, by extrajudicial claim of the creditor and by any act of acknowledgement of the debt by the debtor.

## COUNTER STATEMENT OF THE CASE

The thirty-seven Respondents and others similarly situated, totalling ninety-one, filed suit on June 19, 1978, pursuant to 42 U.S.C. § 1983 and 18 L.P.R.A. 249 (e), as part of a proposed class action against certain high officials (Chardon and Ramos, Petitioners) in the Department of Education of the Commonwealth of Puerto Rico alleging political discrimination in employment. On the basis of numerosity the District Court denied class certification on August 21, 1978. After denial of class certification, there were filed (i) a Motion for Reconsideration which was denied on September 29, 1978; (ii) an Amended Complaint naming all ninety-one Plaintiffs which was denied on November 24, 1978; and (iii) a Motion for Reconsideration which was denied on December 11, 1978. The ninety-one Plaintiffs then filed separate complaints. After lengthy and protracted proceedings, fifty-five of them ("*Fumero Soto*" Plaintiffs) proceeded to a consolidated jury trial on liability alone on January 26, 1981. After a five day trial a unanimous jury found the Petitioners liable for political discrimination. Chardon and Ramos appealed to the First Circuit.

In the meantime, thirty-six other Plaintiffs ("*Fernandez*" Plaintiffs) had their complaints dismissed by the district court as time-barred under the applicable Puerto Rico one year statutes of limitation. These dismissals were reversed by the First Circuit on appeal in *Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981) wherein *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) was distinguished from the *Fernandez* cases. However, this Court granted certiorari and summarily reversed in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (three Justices dissenting), holding that *Ricks* was indistinguishable.

The *Fumero Soto* cases and the *Fernandez* cases (on remand from this Court) were heard and decided on consolidated appeal. After various petitions for rehearing and modification of judgment were considered, the Court of Appeals for the First Circuit in the fifty-five *Fumero Soto* cases affirmed the liability judgment in favor of thirty-seven Plaintiffs, Respondents herein, who had received letters of prospective dismissal or demotion on or after June 17, 1977 and reversed the judgment of eighteen Plaintiffs who had received letters of dismissal or demotion before June 17, 1977. Petitioners' Appendix, 37a. Additionally, the Court of Appeals held that all thirty-six Plaintiffs in the *Fernandez* cases were time-barred, having received their letters of dismissal or demotion before June 17, 1977.

As to *all* of the Plaintiffs, the Court of Appeals ruled that this Court's limitations decision in *Delaware State College* v. *Ricks*, *supra*, should be retroactively applied. The Court of Appeals also held under Puerto Rico statutory tolling law, 31 L.P.R.A. section 5303, that a class action asserting a section 1983 claim tolls the Puerto Rican statute of limitations during the pendency of the class action for all purported class members and that when class certification is denied for lack of numerosity, the limitations period begins to run anew. Petitioners' Appendix 18a.

Petitioners have filed a Petition for Writ of Certiorari in this Court asking it to review this latter tolling issue. The thirty-seven Respondents and the other fifty-four Plaintiffs, all as Cross-Petitioners, have separately filed a timely Conditional Cross-Petition in which they ask this Court conditionally to grant certiorari and review the *Ricks* retroactivity issue in the event it decides to review the tolling issue raised by Petitioners. The thirty-seven

Respondents herein also file this Brief in Opposition to the Petition for Writ of Certiorari.

## REASONS FOR DENYING THE WRIT

### I. The Court Of Appeals Properly Applied Relevant Decisions Of This Court When It Held That Respondents' 42 U.S.C. § 1983 Actions Were Not Time-Barred Under Puerto Rico Substantive Tolling Law As Set Out In 31 L.P.R.A. Section 5303.

In *Board of Regents* v. *Tomanio* 446 U.S. 478 (1980), this Court held that state tolling law alone governs limitations periods in section 1983 cases. Interpreting 42 U.S.C. § 1988[1] and applying New York's tolling law, this Court rejected the Second Circuit's federal tolling rule which the latter court had considered justified "in the interest of advancing the goals of federalism." This Court said:

> ". . . Under the reasoning of these decisions [*Robertson* v. *Wegmann*, 436 U.S. 584 (1978), *Johnson* v. *REA*, 421 U.S. 454 (1975) and *Monroe* v. *Pape*, 365 U.S. 167 (1961)], the federal courts were obligated to apply not only the analogous New York statute of limitations to respondent's federal constitutional claims, but also to apply the New York rule for tolling that statute of limitations.

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[1] 42 U.S.C. § 1988 provides in relevant part that the jurisdiction of the district courts for the protection of civil rights

"shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court . . .is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . ."

> Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal courts under § 1983—a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action . . . ." 446 U.S. at ____.

In these cases, the First Circuit properly followed *Tomanio* when it applied Puerto Rico substantive tolling law to these suits. This tolling law, 31 L.P.R.A. section 5303, reads as follows:

> "Prescription of actions is interrupted *by their institution before the courts*, by extrajudicial claim of the creditor and by any act of acknowledgement of the debt by the debtor." (emphasis added).

What is important to recognize at the outset, as the First Circuit did, and as explained next, is that under section 5303, the applicable limitations period is not simply suspended but *begins to run anew.*

The First Circuit correctly ruled under section 5303 that when the proposed class action was filed on June 19, 1978—the institution of an action "before the courts"—the one-year Puerto Rico limitations period stopped running for all members of the class. Petitioners' Appendix 16A - 17a. Thus, in *Feliciano* v. *A.S.A.*, 93 P.R.R. 638 (1966) the Supreme Court of Puerto Rico held that for a judicial claim to interrupt the prescription of the action, it is not necessary to serve the summons together with the complaint; mere filing interrupts. And in *Moa* v. *Commonwealth*, 100 P.R.R. 572, 589 (1972), the Puerto Rico Supreme Court stated:

> "[T]he mere effective filing of a complaint before a court within the period of prescription . . . produces the interruptive effect of the extinctive prescription of the action exercised, regardless of the vicissitudes

> that may arise subsequent to the filing of the complaint . . ."

Moreover, the filing of a suit, even though subsequently dismissed upon motion for nonsuit, interrupts prescription, *Parrilla* v. *Loiza Sugar Co.*, 52 P.R.R. 232 (1937), as does a complaint filed in a court without jurisdiction to entertain it. *Diez* v. *Green*, 32 P.R.R. 749 (1924); *Josefa Duran Cepeda* v. *Ismael Morales Lebron*, ____ P.R.R. ____ (P.R. S.Ct., April 14, 1982), Appendix herein 1a. Similarly, as the First Circuit held, the filing of the class action tolled the one-year limitations period under Puerto Rico law even though the class was ultimately denied certification.

Once the class was denied certification in August, 1978, the one-year limitations period began to run anew, as the First Circuit ruled under Puerto Rico law. Petitioners' Appendix 17a-18a. That is, under Section 5303, in contrast to the common law tolling approach of merely suspending the running of a statute of limitations, *a new limitations period began when the class was denied certification. Heirs of Gorbea* v. *Portilla*, 46 P.R.R. 279 (1934) (the limitation period "must be counted anew"); *DeJesus* v. *DeJesus*, 37 P.R.R. 143 (1927) ("[I]t becomes evident that the prescription of the action was interrupted by the mere act of filing the complaint and that interruption has for its effects that the time for the prescription must be computed anew.") See also *Feliciano* v. *A.S.A.*, 93 P.R.R. 638 (1966) where the Puerto Rico Supreme Court said in connection with interruption by judicial claim:

> "[T]he new period begins to run from the time that the litigation action, the commencement of which interrupted the period, ends."

To the same effect is *Josefa Duran Cepeda* v. *Ismael Morales Lebron*, ____ P.R.R. ____ (P.R. S.Ct., April 14, 1982), Appendix herein 1a.

Consequently, when the class was denied certification in August, 1978 the one year limitations period began to run anew and the Respondents, because they filed their individual suits within that year, were not time-barred under Puerto Rico law. Petitioners' contrary argument in their Petition in effect asks this Court to overrule *Board of Regents* v. *Tomanio*, *supra*.

The Petitioners' reliance on *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) is misplaced. There is no conflict between the First Circuit's decision and *American Pipe*. The tolling rule applied in *American Pipe* by this Court was a judge-made federal tolling rule developed in the context of the applicable federal tolling statute for anti-trust actions. 414 U.S. at 558-561. That different tolling rules apply to different federal actions is evident from this Court's quote in *American Pipe* from the Advisory Committee's Note for Proposed Rule 23 as follows:

> "Whether the intervenors in the non-class action shall be permitted to claim . . . the benefit of the date of the commencement of the action for purposes of the statute of limitations [is] to be decided by reference to the *laws governing . . . limitations as they apply in particular contexts.*"
>
> Id. at 554. (emphasis added)

Thus, because these cases involve § 1983, they are governed by Puerto Rico substantive tolling law pursuant to *Tomanio*, as the First Circuit concluded.[2]

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[2] The purportedly supportive cases footnoted by Petitioners at pp. 9-10 n. 10 of their Petition are for the most part distinguishable either

That the First Circuit's decision applying Puerto Rico substantive statutory tolling law is sound is also supported by this Court's decisions in *Carlson* v. *Green*, 446 U.S. 14 (1980) and *Robertson* v. *Wegmann*, 436 U.S. 584 (1978). In *Carlson*, this Court applied a uniform judge-made federal rule of survivorship to a *Bivens* action against federal officials. It went on to emphasize, however, that *Bivens* actions are different in this respect from § 1983 actions because 42 U.S.C. § 1988, as interpreted in *Robertson*, requires that a forum state's survivorship law must be applied to § 1983 actions. Similarly, in light of § 1988 as interpreted and applied in *Tomanio*, Puerto Rico's substantive statutory tolling law, section 5303, applies to § 1983 actions.

Respondents emphasize the uniqueness of Puerto Rico's civil law-based substantive tolling law which begins the running of the applicable Puerto Rico limitations period anew and which is in marked contrast with common law tolling that simply suspends.[3] Several observations must be made in this regard. Unlike § 1983 which has no statute of limitations and no statutory tolling law of its own, it is significant that the anti-trust statute of limitations involved in *American Pipe* explicitly provided for *suspension* of that period during the pendency of any United States anti-trust proceeding. In these cases, how-

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as involving federal statutes of limitations, as pre-*Tomanio* decisions, or as not otherwise inconsistent with the First Circuits decision here.

[3] As the First Circuit stated in these cases: "Puerto Rico has not adopted the American common law, however, and we see no reason not to apply its running-anew rule to unnamed plaintiffs." Petitioners' Appendix 18a.

ever, because § 1983 has no statute of limitations and no tolling law, Puerto Rico statutory tolling law must be applied, as the First Circuit properly held.

Furthermore, because it regularly reviews decisions of Puerto Rico federal district courts, the First Circuit has developed considerable expertise in, and a "feel" for, Puerto Rico civil law. This Court has recognized that Puerto Rico "is a Spanish-Speaking Commonwealth with a set of laws still impregnated with the Spanish tradition" *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42-43 (1970) and that "[w]hen we contemplate such a system from the outside it seems like a wall of stone . . ." *Bonet* v. *Texas Co.*, 308 U.S. 463, 470 n. 17 (1940) (quoting Justice Holmes). The First Circuit is similarly well aware of the importance of Puerto Rico's Spanish civil law tradition in connection with the interpretation and application of Puerto Rico law. *Pagan Torres* v. *Negron Ramos*, 578 F.2d 11 (1st Cir. 1978). Indeed, in these very cases the First Circuit emphasized its familiarity with Puerto Rico law, and especially the Puerto Rico tolling statute involved here, section 5303, when it refused either to reconsider its earlier decisions dealing with a related tolling issue,[4] or to certify that issue to the Puerto Rico Supreme Court. Petitioners' Appendix 24a-26a.

The First Circuit's sensitivity to Puerto Rico civil law in these cases is entirely justified in light of repeated statements to the same effect by the Puerto Rico Su-

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[4] Whether certain protest letters sent by Respondents and others to the Petitioners constituted "extrajudicial claims" within the meaning of section 5303 so as to toll the applicable Puerto Rico one-year limitations period.

preme Court. For example, in *Justo Valle* v. *American International Insurance Corp.*, ____ P.R.R. ____ (P.R. S.Ct., May 22, 1979), that court asserted:

> "Nowadays, it seems unnecessary to reiterate that, in Puerto Rico, the law in the field of damages is governed—both in form and content—by the civil law system." (Translation), Appendix herein 18a.

*See also Manuel Febo Ortega* v. *Superior Court*, ____ P.R.R. (P.R. S.Ct., September 10, 1974) (tolling should be decided under Civil Code, *not* "under institutions extraneous to said Code, thus accelerating its erosion and mongrelization") (Translation), Appendix herein 24a, *and Hector Gierbolini Rivera* v. *Employers Fire Insurance Company*, ____ P.R.R. ____ (P.R. S.Ct., May 18, 1976) ("damages issues cannot be solved behind the back of the civil doctrine applicable") (Translation), Appendix herein 10a.

Consequently, the First Circuit's interpretation and application of Puerto Rico substantive tolling law in section 5303 are entitled to great respect and should be deferred to in these cases. Petitioners' attempts to characterize that interpretation and application as "novel and unprecedented" must be rejected.

**II. The First Circuit's Decision On The Tolling Issue And The Judgment As A Whole, Supported By A Jury Verdict Of Liability Which Is Unchallenged By Petitioners In This Court, Can Be Upheld On Puerto Rico Law Grounds Related To The Pendent Puerto Rico Statutory Claims Asserted In These Cases.**

The Plaintiffs in these cases joined to their § 1983 claims certain pendent Puerto Rico claims based on 18 L.P.R.A. section 249(e). Section 249(e) remained throughout, and still remains in, these proceedings both at the trial level and on review. Further, the jury was

instructed as to these pendent claims and returned a general verdict of liability. Surely as to these pendent Puerto Rico claims—Respondents do not concede for a moment, of course, that any tolling law other than Puerto Rico's should apply to their § 1983 claims—Puerto Rico substantive tolling law governs regardless of the § 1983 claims.

18 L.P.R.A. section 249(e) reads as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status."

That Petitioners were properly sued under this statute is clear from *Muriel* v. *Suazo*, 72 P.R.R. 348, 353 (1951), where the Puerto Rico Supreme Court held:

> "[A] statute for the protection of civil rights, although a penal statute, does not bar a right of action for civil damages, for where the statute imposes upon any person a specific duty for the protection and benefit of others, his neglect to perform such duty creates a liability for any resulting injury."

*See also* 31 L.P.R.A. section 5141 which sets out the obligations of Petitioners for damages caused by their fault:

> "Sec. 5141. Obligation when damage caused by fault or negligence.
>
> A person who by an act or omission causes damage to another through fault or negligence, shall be obliged to repair the damage so done. Concurrent

> imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity. Civil Code, 1830, Sec. 1802, June 9, 1956; No. 28, p. 86, eff. June 9, 1956."

31 L.P.R.A. section 5303, with its provision for interruption by judicial claim, clearly controls tolling of the applicable one year limitations period for these pendent section 249(e) claims. Under Puerto Rico precedents, as discussed earlier, when the proposed class action was filed on June 19, 1978, the one year limitations period stopped running. However, once the class was denied certification in August, 1978, the limitations period began to run anew for the section 249(e) claims. Thus, the First Circuit's decision on tolling and the judgment as a whole can be upheld on Puerto Rico law grounds relating to these pendent section 249(e) claims alone. Reaching out to address the § 1983-related tolling issue which Petitioners attempt to raise would therefore make no difference in the outcome of these cases.

### III. Ortiz Rivera's Complaint Was Timely Filed, As Found By The District Court And Affirmed By The First Circuit.

Petitioners strain mightily to create a conflict—which does not in fact exist—between the First Circuit's decision as to Ortiz Rivera and this Court's decision in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981). In the latter case, this Court summarily held, relying on *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), that the § 1983 causes of action of similarly situated employment discrimination plaintiffs accrued when they received their official letters of demotion, even though their demotions became effective later.

Here, the district court determined as a finding of fact and after considering all relevant evidence, that Ortiz

Rivera was officially notified by letter on June 21, 1977 of his prospective demotion. *See* Petitioners' Appendix, 78a-79a. It was on this date that his § 1983 cause of action accrued.

Thereafter, the First Circuit reviewed this finding of fact in light of the entire record and affirmed it as based on ample evidence. It stated:

> "We rule that, *as with all the other plaintiffs*, the statute of limitations started to run as to Ortiz Rivera on the day he received the official letter of demotion, which was on June 21, 1977. The class action was, therefore, timely filed." Petitioners' Appendix 5a-6a.

There is simply no reason for this Court to review this finding of fact, fully supported by the evidence and not clearly erroneous, F.R.C.P. 52(a), yet another time.

## CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.[5]

Respectfully submitted,

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[5] However, in the event this Court should grant the Petition, Respondents and others as Cross-Petitioners ask this Court in a separately and timely filed Conditional Cross-Petition to review the *Ricks* retroactivity issue present in these cases. *See* Counter Statement of the Case at page 3 herein.

IN THE SUPREME COURT OF PUERTO RICO

**No. 0-81-479**

**(Translation)**

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JOSEFA DURAN CEPEDA.,
*Plaintiffs-petitioners,*

v.

ISMAEL MORALES LEBRON *et. al.*,
*Defendants-respondents.*

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**CERTIORARI**

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, April 14, 1982

On February 8, 1978, a motor vehicle belonging to the Commonwealth of Puerto Rico and insured by Universal Insurance Co. ("Universal") caused the death of the mother and grandmother of plaintiffs-petitioners, who are Dominican citizens.

On September 1, 1978, petitioners filed an action for damages before the United States District Court for the District of Puerto Rico. Summons were served on Universal and the Commonwealth on March 30, 1979.

On April 11, 1979, the federal court dismissed the action against the Commonwealth for lack of jurisdiction, and on November 29, 1979, it did the same as to Universal. It reconsidered, and reaffirmed its position in its opinion and order of August 1, 1980.

On June 13, 1980, petitioners filed their complaint before the Superior Court of Puerto Rico. On June 9, 1981, the court dismissed the action on the grounds that it was barred by the statute of limitations. We agreed to review.

Article 1873 of the Civil Code, 31 L.P.R.A. § 5303, sets down the ways in which the statute of limitations may be tolled:

> Prescription of actions is interrupted* by their institution before the courts, by extrajudicial claim of the creditor, and by any act of acknowledgment of the debt by the debtor.

Article 1845 of the Civil Code, 31 L.P.R.A. § 5266, included in the chapter referring to *usucapio*, provides:

> Civil interruption is caused by a judicial citation of the possessor, even should it be by order of a court or of a judge without jurisdiction.

What is the meaning of the phrase "institutiton before the courts", as used in art. 1873? Does it refer to the filing of a complaint before a court without jurisdiction or venue ("competencia")? For purposes of this article, when is an action instituted before the courts, when it is filed or when the defendant is summoned? What is the relation, if any, between arts. 1873 and 1845? When an action is dismissed, does a new period of limitations start to run or does the previous one continue running? These are the basic questions raised in this action.

Petitioners and Universal are the only ones affected by the elucidation of these questions. Any way we look at it, the action against the commonwealth was time-barred. When petitioners filed this action with the Superior Court, more than a year had alapsed since the action against the Commonwealth had been dismissed. Consequently, the decision under review should be affirmed as to the Commonwealth.

In *Diez* v. *Green et al.*, 32 P.R.R. 749 (1924), this Court had before its consideration a controversy identical to the present one between Universal and the petitioners. There we held that

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[* Translator's note: Although the official translation of the Civil Code refers to "Prescription of actions is interrupted" (art. 1873) or to "Civil interruption" (art. 1845), we have chosen to use the more common phrase "tolling of the statute of limitations.]

the institution of an action before a court without jurisdiction, in that case the federal court, too, tolled the statute of limitations under the article then corresponding to art. 1873.

We have also held that the filing of a complaint—and not the service of summons—tolls the statute of limitations. *Feliciano* v. *A.S.A.*, 93 P.R.R. 638 (1966); *Barrientos* v. *Gov. of the Capital*, 97 P.R.R. 539 (1969); *Moa* v. *Commonwealth*, 100 P.R.R. 572 (1972). In *Feliciano* we held, at 643:

> . . . our civil law tradition requires a converse solution, [to the demand that notice of the complaint be served as a requirement for the tolling of the statute] for the acknowledged principle of interruption is the unmistakable manifestation of one, who threatened with the loss of his right, expresses his wish not to lose it.

In *Moa* we stated, at 589:

> [T]he mere effective filing of a complaint before a court, within the period of prescription . . . produces the interruptive effect of the extinctive prescription of the action exercised, regardless of the vicissitudes that may arise subsequent to the filing of the complaint, like, for example, when the court to which appeal has been taken lacks jurisdiction to take cognizance of the action or when the claim is dismissed by means of a motion of nonsuit.

We have also held that the tolling effect of a judicial action lasts until the action filed comes to an end. *Moa*, at 589; *Widow of Carlo* v. *Toro*, 99 P.R.R. 196, 221 (1970). It is then that its new period of limitation begins to run. *Feliciano*, at 644.

The aforecited case law would suffice to decide the questions raised. However, the learned trial court's decision as to the contrary, and the importance of the issues raised, some of which are still being debated in other jurisdictions, prompt us to consider them anew.

Articles 1845 and 1873 of our Civil code are modeled after articles 1945 and 1973 of the Spanish Civil Code of 1888. These, in turn, are derived from several sources. Article 1945 is identical to art. 1984 of Florencio Garcia Goyena's draft code of

1851. Article 1984 of said draft code, however, was part of a separate chapter, applicable both to *usucapio* and to limitation of actions. This provision, on the other hand, derived from art. 2246 of the Code Napoleon, which went back to an ancient French custom contrary to Roman law. F. Garcia Goyena, *Concordancia, Motivos y Comentarios del Codigo Civil Espanol* 1019 (Zaragoza 1974, reprint of 1852 ed.).

The precedent most directly related to art. 1973 of the Spanish Civil Code is art. 2244 of the French Civil Code, except that the acknowledgment of the tolling effect of the *out-of-court* claim is strictly Spanish. *Third Partida*, Title 29, Law 29. For a study of the ancient roots of limitation of actions in Spanish law, see: 3 F. Sanchez Roman, *Estudios de Derecho Civil* 265 *et seq.* (2d ed. 1891) (Madrid); Fuenmayor, *La interrupcion judicial de la prescripcion extintiva civil en el derecho navarro*, 27 Anuario de Derecho Civil 3 (1974); I J. Garceran de Vall y Souza, *La Prescripcion Extintiva en el Derecho General Privado* 217 *et seq.* (J. Montero ed.)(Havana 1944).

Since the Spanish Civil Code is unusually silent on whether a judicial claim before a judge without venue ("competencia") tolls the statute of limitations, the question has been meticulously studied by the doctrine. The overwhelming majority of commentators arrives at the same conclusion we reached in *Diez* v. *Green*, *supra:* The action before the courts, even if they do not have jurisdiction or venue ("competencia") has the effect of tolling the statute of limitations. L. Diez Picazo, *La Prescripcion en el Codigo Civil* 111, 122 (Ed. Bosch)(Barcelona 1964); 1-1 J. Puig Brutau, *Fundamentos de Derecho Civil* 898-899 (Ed. Bosch) (Barcelona 1979); 1-2 M. Albaladejo, *Derecho Civil* 472 (Ed. Bosch) (Barcelona, 3d ed. 1975); Albaladejo *Comentario al Articulo 1973 del Codigo Civil*, 1977 Rev. de Der. Privado 987-994; J. L. Lacruz Berdejo, *Elementos de Derecho Civil* 301 (Bosch) (Barcelona 1974); *contra:* XXXII-2 Q.M. Scaevola, *Codigo Civil* 959 *et seq.* (Ed. Reus) (Madrid 1965).

The Spanish doctrine generally applied by analogy the rule established in art. 1945 to the limitation of actions that is the

object of art. 1973. Diez Picazo, *op. cit.* at 122, explains the basic foundation for the analogy:

> Our Code, which to a great extent follows Comparative Law on this point, admist, however that a complaint filed before a judge without venue effectively tolls the statute of limitations. The reason is clear. The will of the owner or of the record holder to assert his rights becomes evident from the time the complaint is filed . . . Thus, it does not seem right or fair that he may take advantage of a possible error as to the venue ("competencia") of the entity where the complaint is filed.

See: I D. Espin Canovas, *Manual de Derecho Civil Espanol* 467-68 (Ed. Rev. de Der. Privado) (Madrid 1975).

In Spanish law, the work "*competencia*" (venue) includes, within the context we are discussing here, the meaning accorded to said term in our Law, as well as the meaning of the concept jurisdiction, whether over the subject matter or over the person. Diez Picazo, *loc. cit.* This is the same in French law. 12 C. Aubry, *Droit Civil Francais* 466 (Librairies Techniques) (7th ed. 1961) (Paris).

Beginning with Manresa, Spanish civil law sustains, as in our decision in *Feliciano* and in later cases, that in the case of the statute of limitations, the mere filing of the complaint has a tolling effect. It is *usucapio* that is not interrupted until the summons is served. XII J. Manresa, *Comentarios al Codigo Civil Espanol* 1235 (Ed. Reus) (6th ed. 1973) (Madrid); Fuenmayor, *ante* at 11, 14.

In its approach, Spanish law also coincides with our position in *Feliciano*, at 644, where we held that a whole new term begins to run at the termination of an action whose institution tolled the statute of limitations. Puig Brutau, *op. cit.* 896; Albaladejo, *Derecho Civil*, *op. cit.* at 466; Diez Picazo, *op. cit.* at 128.

The steadfast rule in French law is that a judicial claim tolls the statute of limitations, and *usucapio*, even if brought before a court without venue ("competence") II-1 F. Marty and P. Raynaud, *Droit Civil* 872 (Sirey) (Paris 1962); C. Aubry, *loc.*

*cit.*; Baudry-Lacantinerie & Tissier, "Prescription" (translated by J. Mayda), 5 *Civil Law Translations* 249 (West Publishing Co.) (St. Paul 1972); 7 Fuzier-Herman, *Code Civil Annote* 960 (Sirey) (Paris 1948); Encyclopedia Dalloz, *Prescription Civil* 450 *et seq.*, par. 167; Civ. March 5, 1957, D. 1957, 334; 3-2 Mazeaud and Mazeaud, *Lecciones de Derecho Civil* 420 (Ed. Juridicas de Europa-America) (Buenos Aires 1960). The same rule applies in France when the action is improperly filed before a foreign court. Civ. January 21, 1975, D. 1975, *Inf. rap.* 83.

Other civil law jurisdictions generally follow the doctrine prevailing in Puerto Rico on the tolling effect of a complaint filed before a court without venue ("competencia"). This is the rule in effect in Italy: A Scialoja and G. Branca, *Commentario del Codice Civile* 260, Book 6, arts. 2910-2969 (Soc. Editora del Foro Italiano) (Rome 1972); Cass. July 7, 1947; G. Pescatore and C. Ruperto, *Codice Civile* 2880, n. 9 (Giuffre, ed.) (Milan 1978); in Germany: art. 212, BGB; in Switzerland: arts. 135(2) and 139 of the Code on Obligations; in Portuga;: *Codigo Civil de 1966*, art. 323, subsection 1; in Argentina: 1-3 A. G. Spota, *Tratado de Derecho Civil* 365-66 (Ed. Roque Depalma) (Buenos Aires 1959); M. A. Argaranas, *La Prescripcion Extintiva* 103-04 (Ed. Argentina) (Buenos Aires 1966). It surely did not go unnoticed that several of the aforementioned countries, like Puerto Rico, have a dual court system. In some, like Germany and Switzerland, the period of limitation of actions is shorter.

In the absence of a statute, United States common law has generally favored a rule that is the opposite of the civil law one. At present, however, most states have passed legislation recognizing the tolling effect of defective judicial claims. Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1243 (1950); Comment, *The Tolling of the Statute of Limitations When a Case has been Previously Dismissed for Lack of Jurisdiction or for Improper Venue*, 7 Univ. of Richmond L. Rev. 319 (1972); Note: *Limitations of Actions:*

*Statutes Permitting New Action within One Year after Reversal Held Applicable to Nonsuit*, 33 Calif. L. Rev. 453 (1945). In some cases, even when the statute does not cover situations where the complaint is filed before a court without jurisdiction or venue, ("competencia") the law has been broadly construed and the improper judicial claim has been accorded a tolling effect. Pieper, *The Illinois Savings Statute: An Analysis of Section 24a of Chapter 83*, 9 John Marshall Journal of Practice and Procedure 465, 474 *et seq.* (1976).

Although this case is governed by the civil law, it would be interesting to see, from the point of view of comparative law, how some U.S. courts have handled this problem. In *Roth* v. *Northern Assurance Company*, 203 N.E.2d 415 (Ill. 1964), the situation was identical to the one at bar. The state court held that the action filed before a federal court without jurisdiction tolled the statute of limitations. The opposite situation was considered in *Sachs* v. *Ohio National Life Insurance Co.*, 131 F.2d 134 (7th Cir. 1942). The first complaint was filed before a state court without jurisdiction. The United States Court of Appeals for the Seventh Circuit held that said complaint was not time-barred. In that same vein, Comment, *supra*, 7 Univ. of Richmond L. Rev. 319, 324 (1972). *Contra: United States* v. *Continental Casualty Co.*, 354 F.Supp. 1353 (D.P.R. 1972). It has also been held that a complaint filed before a foreign court without jurisdiction has a tolling effect. *Cook* v. *Britt*, 290 N.E.2d 908 (Ill. 1972). The reason for these statutory and case law rules, which are similar to those controlling in most civil law countries, was thus explained by Justice Holmes in *New York Central & H. Railroad Co.* v. *Kinney*, 260 U.S. 340, 346 (1922):

> Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.

To conclude, we reafirm our decisions in *Diez*, *Feliciano*, *Moa*, and other cases cited. The complaint filed before a court

without jurisdiction or venue ("competencia") tolls the statute of limitations from the time it is instituted and, when the first court enters a final and unappealable judgment, a new term begins to run. Since the facts do not warrant it, the discussion of possible exceptions to this rule has no place in this opinion.[1] Neither should we probe into the relevant provisions of the Commerce Code. Particularly see art. 941 of said Code, 10 L.P.R.A. § 1903.

For the foregoing reasons, *the dismissal of the complaint as to the Commonwealth will be affirmed, the judgment as to Universal Insurance Co., will be reversed and the case shall be remanded for further proceedings not inconsistent with this opinion.*

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[1] For cases where the rule is abused or used in bad faith, see: F. de Castro y Bravo, *Temas de Derecho Civil* 161, n. 1 (Madrid 1972). For situations where the plaintiff voluntarily asks for dismissal of his suit, see: *Gonzalez* v. *The San Juan L. & T. Co.*, 17 P.R.R. 115 (1911). The court below only rested its decision on this case, but its facts are different from those in the case at bar. Its reasoning is also different. In *Gonzalez*, at 125, it was held:

> "Notwithstanding the doctrine established by the Supreme Court of Spain and the opinion of the commentator, Manresa, we will decide this legal question in accordance with the principles well established in American jurisprudence; because in our opinion as judges we find the latter more in harmony with equity and justice and with the spirit of the law itself."

**CHIEF CLERK'S CERTIFICATE**

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on April 14, 1982, in case No. 0-81-479, *Duran Cepeda et al.* v. *Morales Lebron et al.*, the original of which, in Spanish, is under my custody in this Office.

IN WITHNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 30th day of July 1982.

/s/ Lady Alfonso de Cumpiano
LADY ALFONSO DE CUMPIANO
Chief Clerk
Supreme Court of Puerto Rico

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

No. R-75-369

HECTOR GIERBOLINI RIVERA, *et al.*,
Plaintiffs-Appellees,
v.
EMPLOYERS FIRE INSURANCE COMPANY,
Defendant-Appellant.

JUDGMENT FROM THE SUPERIOR COURT, SAN JUAN PART,
ANTONIO BAUZA TORRES, JUDGE

REVIEW

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, May 18, 1976

A friend invited Mr. Gierbolini Rivera to visit his home. At the request of his host, Mr. Gierbolini went to the yard of the house and sat on a wooden bench. One of the legs of the bench sank in the lawn and it collapsed on its side. As a result plaintiff-appellee, who then weighed 180 pounds and was 66⅓ inches tall, fell down. Mr. Gierbolini suffered a fracture of the coronoid apophysis of an elbow. The physiotherapy treatments he received have not led to a total rehabilitation.

The trial court concluded that "the bench was apparently safe and there was nothing to indicate the risk or danger which plaintiff might run upon sitting on the place to which he was led." Nevertheless, the Court deemed that "a dangerous situation had been created upon placing a bench on a soft surface such as the lawn after the rain had softened the soil's consistency", that "the visitor of a public establishment is entitled to suppose that due care has been exercised to provide a safe visit to the place" and that "We do not see any reason whatsoever why a different rule should be established for the visitor of a private residence."

Therefore, defendant was ordered to pay plaintiff several sums for different concepts, amounting to $16,265 plus costs, and $2,500 for attorney's fees. Defendant has appealed before us for the review of this judgment.

I

First of all, this case usefully emphasizes that, in Puerto Rico, and with very few exceptions provided by our legislation, the right to recover damages is governed by the Civil Law rules. The principles of the common law and of other juridical systems may be useful for a comparative study and sometimes for the development of domestic institutions. There are instances when the civil law and the common law actually converge in some aspects of this matter, or when it is desired that such convergence may take place. Di Prisco, Nicola, *Concorso di Colpa e Responsabilita Civile* 422 Napoli, 1973; Jardi, Enric, *La Responsabilitat Civil Derivada de l'Acte Il-licit* 114, Barcelona, 1958. On occasions, the same conclusion is reached by different means. However, damages issues cannot be solved behind the back of the civil doctrine applicable, although this does not mean that such doctrine is always the most adequate.

Situations like the one at bar are an example of the foregoing. The general trend is to decide them on the basis of the difference there used to be in Anglo-American law between the liability that is due to an invitee, a franchisee, or a licensee or a trespasser. *Goose* v. *Hilton Hotels*, 79 P.R.R. 494 (1956). This distinction is completely unknown, however, in civil law, and its importance in the Anglo-American law has remarkably decreased. In the specific case of the guest most of the North American case law still accepts the traditional terminology, but the latter is under a serious challenge. 2 *Statement of the Law Second, Torts* 378 *et seq.* (1956); Prosser, *Handbook of the Law of Torts* 378 *et seq.*, 4th ed. 1971. Several states arleady reject the consecrated classification of the guest. *Rowland* v. *Christian*, 443 P.2d 561 (Calif. 1968); *Kennev*

v. *Grice*, 465 P.2d 401 (Colo. 1970); *Peterson* v. *Balach*, 199 N.W.2d 639 (Minn. 1972); *Alexander* v. *General Accident Fire and Life Ins. Co.*, 98 So. 2d 730 (La. 1957); *Preston* v. *Sleziak*, 167 N.W.2d 477 (Mich. 1969). The Supreme Court of the United States classifies the difference between invitees and licensees as a vestige of feudalism. *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 630-631 (1959). England has gone even further: the difference between invitees and franchisees has been repealed by law. *The Occupier's Liabilty Act 1957*, 23 Halsbury, *Statutes of England* 792 *et seq.* 3 ed.; Charlesworth, *On Negligence* 445-446, 4th ed., London, 1962. For the historical precedents of these concepts, see: Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. Rev. 182, 359 (1953).

In view of the increasing nonconformity in the Anglo-American law with the aforementioned differences, one cannot be surprised by the fact that in civil law regions where common law is deeply rooted, the doctrine refuses to willingly accept said contested concepts. 8 Nadeau, *Traite de Droit Civil de Quebec* 157 *et seq.*, Montreal, 1949. Likewise, in the case at bar it lies to examine the problem from the point of view of civil law.

II

Article 1802 of the Civil Code, 31 L.P.R.A. § 5141, provides that "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done...." This wide-ranging principle has generated intense discussions on the theory of fault since fault and negligence are faces of the same coin inasmuch as, in Manresa's words, "fault requires the execution of a positive act causing a damage to another person different from the one who executed it, and, in turn, negligence supposes an omission producing the same effect, although both have in common that the act be executed or the omission incurred without an injurious intent...." 12 Manresa, *Comentarios al Codigo*

*Civil Espanol*, 837, 6th ed., 1973. The logical strength of the concept of fault appears to be imposing. It seems to be a law of nature to say, as Andre Tunc states, that there is no liability without fault. However, Tunc and other importance commentators have extensively documented, the decadence which the concept of fault has been experimenting, in contrast to the process of continuous expansion of the concept of liability without fault. Tunc, Andre, *Fondements et fonctions de la responsabilite civile an droit francais*, published in Klein, Frederic-Edouard, *Colloque franco-germano-suisse sur less fondements et les fonctions de la responsabilite civile* 7 *et seq.*, Bale et Stuttgart, 1973; Viney, G., *Le declin de la responsabilite individuelle*, 1965, *passim*.

The theory of risk has undermined vital sectors of the former dominions of fault. It is necessary to specify the general contours of this erosion, insofar as the solution to the present controversy greatly depends thereon.

The theory of risk basically maintains that "Every person who through his activity creates a risk of causing damage to another person, should always be liable for this damage if it is produced, without the need of any personal fault." Orgaz, Alfredo, *La Culpa* 24-25, Buenos Aires, 1970. The theory of risk is also known as the theory of liability without fault, of the objective damage, of the created risk or the objective risk. Borrell Macia, *Responsabilidades Derivadas de Culpa Extracontractual Civil* 6 *et seq.*, Bosch ed., Barcelona 1942. With respect to its general nature, see: Traviesas, *La Culpa*, 13 *Rev. Der. Priv.* 273 (1926); Suss, *La evolucion de la responsabilidad por riesgo en el moderno derecho aleman*, 27 *Rev. Der. Priv.* 54, 137 (1943); Martinez Sarrion, *La responsabilidad objectiva como garantia patrimonial*, 50 *Rev. Der. Priv.* 117 (1966); Lawson, *Negligence in the Civil Law* 44 *et seq.*, Oxford, 1950. This doctrine has been acknowledged under specific circumstances in our country, but without entailing the rejection of the concept of fault. *Mendoza* v. *Cerveceria Corona*, 97

P.R.R. 487 (1969); *Rivera* v. *Caribbean Home Construction*, 100 P.R.R. 105 (1971). The same thing has happened in Spain with similar circumspection. Judgments of June 30, 1959, April 5 and 9, May 14 and October 30, 1963, June 15, 1967, May 11, 1971, May 29, 1972, and November 17, 1973; 12 Manresa, op. cit., at 840.

The theory of risk has extended to sectors of civil liability in France, Germany, Switzerland, the Scandinavian Countries, the socialist countries, and other regions. Andre Tunc, *op. cit.*, at 37. Nevertheless, it should be stressed that in civil law countries, the gradual and continuous expansion of this theory has in no way led to the total relinquishment of the requirement of fault. Fernandez Martin-Granizo, M.: *Los danos y la responsabilidad objectiva en el derecho positivo espanol* 94-96, Aranzadi ed., Pamplona, 1972. The doctrine's objection of such relinquishment is virtually unanimous. Yung, Walter, *Principes fondamentaux et problemes actuels de la responsabilite civile en droit suisse*, in Klein, *Colloque franco-germano-suisse*..., *supra* at 137.

According to some commentators the theory of risk generally covers activities which are the source of economic benefits for the author. Orgaz, A., *La Culpa* 25, Buenos Aires, 1970; Fernandez Martin-Granizo, *supra* at 108 *et seq.* *Ubi emolumentum, ibi onus.* Deutsch stresses the technical risk., Deeutsch, Erwin. *Mecanismes fondamentaux de la responsabilite civile en droit allemand*, in Colloque..., *supra* at 71. Tunc and others extend it to cover traffic accidents and damages which are collectively sustained. *Op. cit.* 25. The new Civil Code of Portugal gives a categorical solution to the problem in an obvious effort to arrest the development of the theory of risk by mere action of the courts. The new art. 483, second ordinal, provides: "In the absence of fault, compensation is obligatory only in cases specified by law." (Translation ours.) Civil Code, Imprensa Nacional de Lisboa, 1966.

A minor tendency, both in civil as well as in common law, aims at imposing liability whenever the damage caused stems from an act which permits the risk to be calculated and insured. II-II Puig Brutau, *Fundamentos de Derecho Civil* 69 (1956); Tunc, Andre, 1973, *loc. cit.*; 2 Harper and James, *The Law of Torts* 1477 (1956). We have not verified, however, under any of the described theories, that in the present state of the civil law the damage sustained by a guest has always to be compensated, whether fault is or is not involved. The theory of risk has not reached that frontier yet, although it is possible that it may invade it if the social and economical conditions eventually require it.

In this case, it is therefore inescapable to explore whether or not the host of the injured party incurred fault, inasmuch as the theory of risk is not applicable herein.

III

Before going any further we should set the standard to precisely determine the existence or absence of fault under these circumstances. The rule generally accepted is that there is fault when one does not act as a man of normal or ordinary diligence would, a good father of a family, according to the circumstances of the case. Judgment of December 22, 1928 (Spain); 12 Manresa, *op. cit.* at 849-850; Puech, Marc, *L'Illiceite dans la Responsabilite Civile Extracontractuelle* 52 *et seq.*, Paris, 1973; Rassat, *La Responsabilite Civile* 37, Paris, 1973; Visintini, G., *La Responsabilita Civile nella Giurisprudenza* 388, Padova, 1967; *Responsabilite du fait personnel*, 6 *Encyclopedie Dalloz*, 1975, par. 41; Orgaz, *La Culpa* 106 (1970). The modern trend conceives the fault as a social and objective concept, different from the former fault *in concreto*, where the capacity of the individual per se was considered. Rassat, *supra* at 37. The controlling factor is how a common and ordinary prudent man would have behaved in a similar situation. 6 *Encyclopedie Dalloz*, *supra*, paragraph 42. Hence, fault has a protean nature; it changes as the opinion

of men changes according to place and time factors. Fault, however, does not include the simple error of judgment, the simple oversights, the slight lapses which are part of human nature. XXXI Scaevola, *Codigo Civil* 296 (1961); IV-II Puig Pena, *Tratado de Derecho Civil Espanol* 575 (1951); Lombardi, La Responsabilidad Extracontractual Civil en el Derecho Panameno 76, Univ. of Panama, 1965, Tunc, Andre, *op. cit.* at 23-24.

As it can be seen, "fault" is such a malleable concept that the failure to exercise rigour thereof may even permit a surreptitious expansion of the theory of risk, leaving to the rule of fault the role of a mere eggshell. It would suffice to say that a particular damage may be foreseen by an ordinarily prudent man in order to project the no-fault liability concept towards a new sphere. This flexibility of the concept of "fault" is indeed desirable; otherwise, the law regarding tort liability would be enervated. On the other hand, the expansion should occur only after a frank and open discussion of the values at stake and the socioeconomical situation involved.

In this last sense many questions may arise. Which is the extent of insurance in the new field?[1] Does it suffice to have an isolated individual insurance or should a collective insurance be established for the more ample distribution of the risk? What social impact does a specific extension of the no-fault liability have on the system of values of the country in question? Up to what extent should the consideration of these problems be entrusted to the legislative power, as in the Portuguese civil law, at least, preferentially?[2]

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[1] No data on this matter is available at the Office of the Commissioner of Insurance of Puerto Rico.

[2] See what happened in the field of automobile and labor accidents. Automobile Accident Social Protection Act, No. 138 of June 26, 1968, as amended, 9 L.P.R.A. § 2051 *et seq.*; art. 404 of the Political Code, 3 L.P.R.A. § 422; Workmen's Accident Compensation Act No. 45 of April 18, 1935, as amended, 11 L.P.R.A. § 1 *et seq.*; Act No. 77 of June 23, 1958, 11 L.P.R.A. § 61 *et seq.*; Disability Benefit Act, No. 139 of June 26, 1958, as amended, 11 L.P.R.A. § 201 *et seq.*

In the case at bar, it is true that the bench remained on the lawn after the rain. However, the bench seemed to be safe, and there was nothing to indicate to the host and his guests the presence of a risk. We have not found under the civil law any case law or doctrinal statements, admitting that the behavior of the host in a case of this nature overweighs in such manner the rule of acceptable behavior for the common man under similar circumstances that liability should be imposed.

In view of the foregoing the judgment appealed from will be reversed.

Mr. Justice Torres Rigual, Mr. Justice Diaz Cruz, and Mr. Justice Negron Garcia concur in the result.

*CHIEF CLERK'S CERTIFICATE*

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on May 18, 1976, in case No. R-75-369, *Cierholini Rivera et al.* v. *Employers Fire Insurance Co.*, the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 1st day of December 1981.

Lady Alfonso de Cumpiano
Chief Clerk
Supreme Court of Puerto Rico

[SEAL]

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

No. R-78-367

JUSTO VALLE, ETC.
Plaintiffs and Appellees,
*v.*
AMERICAN INTERNATIONAL INSURANCE CO., AND GLORIA DINORAH DIAZ,
Defendants and Appellants.

REVIEW

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, May 22, 1979

The issues in controversy herein arise from a new aspect of our law in the field of damages: the consequences of a chain reaction collision of cars standing in a line.

Five vehicles were standing in line on the road in front of Levittown. The first two automobiles were waiting for right of way to turn to the left. The second car was driven by Justo Valle, plaintiff-appellee herein, and the third one by Gloria Dinorah Diaz, defendant-appellant. The other two cars were standing behind hers. The accident occurred when a sixth vehicle collided against the line of cars provoking a chain reaction collision. The force of the collision was such that Valle's automobile, the second in the line, was pushed from a distance of eight to ten feet against the vehicle ahead.

The driver of the second vehicle filed an action only against the driver of the third car. The trial court found that defendant's conduct was the proximate cause of the accident because "due to her negligence, she lost control of her vehicle and, besides, . . . she stood too close behind plaintiff's car. . . ." The findings of fact indicate that appellant's automobile was standing at a distance of from two to three feet behind Valle's

car. The trial court held appellant liable for the mental sufferings and bodily injuries sustained by Valle, for the damage to his vehicle, and for the mental sufferings sustained by his wife. We agreed to review.

1. *The applicable law.*

The Vehicle and Traffic Law of Puerto Rico, Act No. 58 of May 30, 1973, 9 L.P.R.A. § 301 *et seq.*, does not give us the key to the solution of the matters raised herein. Nevertheless, its history should be mentioned. Article 5-1108 of the Act, 9 L.P.R.A. § 1139, regulates the distance between moving vehicles. H.B. No. 583, which is the source of the Vehicle and Traffic Law, originally contained, in its art. 5-702, a provision which prohibited parking or standing a vehicle at a distance of less than three feet from another vehicle. The final version of this article, 9 L.P.R.A. § 1013(b)(1), makes no reference to the word "standing." See 27 *Diario de Sesiones*, Camara, 1670 (1937).

Aside from the importance of this fact in the light of the principles to be discussed later, and in the absence of specific legislation therefor, the rules applicable to this case are those stemming from the general law on damages.

Nowadays, it seems unnecessary to reiterate that, in Puerto Rico, the law in the field of damages is governed — both in form and in content — by the civil law system. But it has not always been so understood. Decisions and pronouncements to the contrary have not been expressly reversed nor contradicted.

In *Esbri* v. *Estate of Juan Serralles*, 3 P.R.R. 47, 91-93 (1902), it was stated that:

> "American doctrines and theories must control the courts of Porto Rico even in the construction of the laws of Spain, which are still found on the statute books of Porto Rico."

The decisions in *Marimon* v. *Pelegri*, 1 D.P.R. 225, 229 (1902), *Bravo* v. *Franco*, 1 D.P.R. 242, 244 (1902) revolved

around that same doctrine. A year later, the Court explained its opinion in *Chevremont* v. *People of Porto Rico*, 3 P.R.R. 215, 245 (1903):

> "We are always inclined to adduce the doctrines of American jurisprudence when applicable to judicial problems in the courts of this Island, considering them as more progressive, and as an evolution of the old system."

The grounds for these developments were laid two years before, in *Velez* v. *Ramirez*, 1 D.P.R. 199, 292 (1901), when the court refused to consider a judgment of the Supreme Court of Spain issued on February 23, 1899 "because it had been rendered after the extinction of [Spain's] sovereignty over this Island...."

In 1921, in view of the prevailing situation, a renowned scholar of the Anglo-American and other civil law systems made the following commentary:

> "In the Philippines and in Porto Rico there are many signs that common-law administration of a Roman code will result in a system Anglo-American in substance if Roman-Spanish in its terms."

R. Pound, *El Espiritu del "Common Law"*, translated by J. Puig Brutau, ed. Bosch, Barcelona, n. d., p. 18 [R. Pound, *The Spirit of "Common Law"* Boston, Marshall Jones Company, 1921, p. 2]. Pound's prophesy has not yet come totally true. In recent decades the Supreme Court of Puerto Rico has struggled to stop that trend, which started at the beginning of the century.

Consequently, all cases cited which tend to solve civil-law problems through common-law principles are reversed. In the appropriate cases, it shall lie to employ the common law in its multiple and rich versions — the Anglo-American, the original English, the Anglo-Canadian, and others — as a point of reference for comparative law, and the use of examples from other juridical systems shall also be permissible.

2. *Liability in cases of chain reaction collisions.*

This matter is not particularly regulated by our Vehicle and Traffic Law. Neither is it regulated by the Spanish Traffic Code, whose initial version was approved in 1934 and which, therefore, cannot be applied to Puerto Rico. J. de la Guardia Garcia, *Normas Legales de la Circulacion*, 2 ed., Ed. Aranzadi, Pamplona, 1974, *passim*. We have to resort to art. 1802 of our Civil Code, which is equivalent to art. 1902 of Spain.

We should mark a distinction between two types of chain collisions: the collision of a vehicle against moving vehicles, and the collision of a car against vehicles which are standing in line. This opinion deals exclusively with the second type.

This situation has not been discussed in Spain, at least as far as our research can show. However, the general principles governing it are well-known. As a rule, a causal nexus must exist between the wrongful act and the damage sustained. J. Santos Briz, *Derecho de Danos*, Rev. ed., *Derecho Privado*, Madrid, 1963, p. 223 *et seq*. By the same author, see also, 3 *Derecho Civil - Teoria y Practica* 578 *et seq*., Rev. ed., *Derecho Privado*, Madrid, 1973. In cases of concurrent causes we have to determine which is the efficient cause. In the first work cited, Santos Briz states: "When there are several concurrent causes, that which, in the circumstances, determines the damage, shall be deemed as decisive." (Judgment of January 30, 1954.)" *Op. cit.*, 225.

Spanish case law has repeatedly held that the causal relation can be interrupted (*causa interveniens*) by the irruption of an intervener; but in such a case, the impulse of his act must be conscious, intentional, or unlawful. The intervening act must also be foreign to the action. J. Santos Briz, *Derecho de la Circulacion* 188 *et seq*., Ed. Montecorvo, Madrid, 1976; *cf*. R. Rodiere, *La Responsabilite Civile* 179 *et seq*., Rosseau & Cie., Paris, 1952. Concert of actions may also break the causal nexus. *Santos Briz, loc. cit.* (1976).

The facts before us show that, pursuant to the above-cited rules, the driver of the third vehicle in the line cannot be held liable. The trial court found that the second vehicle, that of plaintiff, was pushed from a distance of eight to ten feet onto the car ahead. This necessarily indicates the force with which the sixth vehicle collided against the last car in the line. The third vehicle was not the efficient cause of the damages sustained by the second. The efficient cause was the manner in which the sixth car was driven, since that was the only car moving.

There was no intervening cause. Even if appellant's conduct had been wrongful, obviously it was not the determinant cause of the damage. Even if there would have been concurrent negligence, the decisive fault was that of the sixth car. We are not dealing either with a case of concert of actions. J. Santos Briz, *Derecho de la Circulacion*, *supra* at 192 *et seq.*

Although the Spanish civil law does not examine the specific cause of chain reaction collision under our consideration in this case, the Italian civil law, which is based on a later code, expressly decides the matter. The Italian Court of Cassation has recently decided that in controversies of this nature only the last vehicle is liable for the consequences of a chain collision between standing vehicles, because said car was the one which caused the collision. Cass., April 14, 1976, cited in G. Pescatore and C. Ruperto, *Codice Civile Annotato*, Ed. Giuffre, Milano, 1578, note on art. 2054 at 2047. See Z.R. Rovelli, *La Responsabilita Civili e Penali per gli Incidenti della Strada* 45 *et seq.*, Ed. Torinese, Turin, 1974.

In order to illustrate our point, we note that the North American viewpoint on this matter, although sometimes through different means, leads to the same results. In the United States the driver of the standing vehicle which is pushed against another is usually released from liability. *Peithman* v. *Beals*, 242 N.E.2d 476 (Ill. App. 1968). The usual practice there is to sue the driver of the vehicle which caused the first

collision. *Stephenson* v. *Wallis*, 311 P.2d 355 (Kan. 1957); *Vadnais* v. *Riskin*, 73 A.2d 813 (R.I. 1950); *Hill* v. *Bardis*, 69 A.2d 1 (N.H. 1949).

In view of the foregoing, the judgment below is reversed and the complaint dismissed.

*CHIEF CLERK'S CERTIFICATE*

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of the Act No. 87 of May 31, 1972) of the opinion rendered by this Court on May 22, 1979, in case No. R-78-367, *Justo Valle, etc.* v. *American International Insurance Co., etc.*, the original of which, in Spanish, in under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 1st day of December 1981.

Lady Alfonso de Cumpiano
Chief Clerk
Supreme Court of Puerto Rico

[SEAL]

IN THE SUPREME COURT OF PUERTO RICO

No. O-74-31

MANUEL FEBO ORTEGA, *et al.*,
Petitioners-Appellants,
*v.*
SUPERIOR COURT OF PUERTO RICO, SAN JUAN PART;
MANUEL REYES SERRANO, JUDGE,
Respondent.

CERTIORARI

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, September 10, 1974

An accident took place on October 3, 1972, gave rise to a complaint filed by appellants on September 20, 1973. Defendant was served with a summons on September 29 of said year, when the period of limitations had almost run out. Defendant filed his answer six days after the end of the one year period. His answer included a compulsory type of counterclaim, where it was alleged that plaintiff was the one who caused the accident.

Appellants then asked for the dismissal of the counterclaim on the grounds that it was time barred. The Superior Court refused to dismiss, and the decision was brought before us for review.

The matter with which we are dealing here has been the object of extensive consideration by courts in the United States, and outstanding commentators have written about the procedures currently used in them. The opinion advanced by most is that where there is jurisdiction because of the existence of a federal question, the filing of a complaint interrupts the statute of limitations in compulsory counterclaims. 6 Wright & Miller, *Federal Practice and Procedure* 109 (1971); 3 Moore, *Federal Practice* 13-848 (2 ed. 1974), n.6; *Azada* v. *Carson*,

252 F. Supp. 988 (D.C. Haw. 1966); *De Vito* v. *Hoffman*, 199 F.2d 468 (D.C. Cir. 1952); *Ash* v. *United States*, 363 F. Supp. 345, 346 (D.C. Neb. 1973). The rationale of this conclusion is that plaintiff is not prejudiced by the application of this rule because, presumably, he knows about the counterclaim or about the possibility of one and the witnesses and other evidence are equally available to both parties. Moreoever, the length of delay was under his control. The rule is usually derived from Rules 13(a), 13(f), and 15(c) of the Federal Rules of Civil Procedure, which are exactly equivalent to Rules 11.1, 11.6, and 13.3 of our Rules.

Since the rules applicable to this suit are identical to the federal ones, at first glance it seems that the controversy would be determined by the above. However, that is not the case. We are precisely before one of the situations where, due to an oversight, a question may be decided — instead of under our Civil Code — under institutions extraneous to said Code, thus accelerating its erosion and mongrelization. *Juanita Ward* v. *Tribunal Superior*, 101 D.P.R. 865 (1974); *Ortiz* v. *Levitt & Sons*, 101 D.P.R. 290 (1973); *Merle* v. *West Bend Co.*, 97 P.R.R. 392, 400 (1969); Puig Brutau, "La accion reciproca del derecho espanol y del derecho norteamericano en Puerto Rico," 44 *Revista de Derecho Puertorriqueno* 499 (1972).

The distinction between the substantive and the procedural is often faint and blurred, but not in this case. What is to be decided here is how and in whose behalf the statute of limitations may be interrupted, having in mind that the limitation of actions is not a procedural, but a substantive matter, with which our Civil Code specifically deals in arts. 1840-1874, 31 L.P.R.A. §§ 5261-5304.

Federal doctrine and case law acknowledge that, at least in cases of diversity of citizenship, federal courts should adhere to the statue of limitations governing in the jurisdiction in question. *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945); 6 Wright & Miller, *op. cit.*, 109. There are some who believe that this rule should apply to all federal cases. 3 Moore, *op. cit.*, 13-246, 13-247.

Therefore, we will examine the question under the body of civil law. The key article is art. 1873. It is equivalent to art. 1973 of the Spanish Civil Code, and reads as follows:

> "Prescription of actions is interrupted by their institution before the courts, by extrajudicial claim of the creditor, and by any act of acknowledgement of the debt by the debtor."

Does the interruption allowed by this article where it refers to the filing of the case only benefit the plaintiff, or does it also allow the filing of counterclaims arising from the same transaction or event?

The most authoritative opinion is that the interruption arising from the filing of a complaint also favors the defendant counterclaimant when his action derives from the same facts that gave rise to the original complaint. XXXII-2 Scaevola, *Codigo Civil* 958-9 (1965). See also: I-2 Puig Pena, *Tratado de Derecho Civil* 444 (1958); XII Aubry et Rau, *Droit Civil Francais* 434-5, 6eme. ed. (par Esmein). This finds support in the old doctrine *Quae temporalia sunt agendum, perpetua sunt ad exceipiendum.*

It has also been pointed out that "It is inadmissible to raise the defense of limitations when — in accordance with his objective conduct and with good faith — he who raises it has led the opposing party to believe that the statute of limitation would not be invoked... For an abuse to exist, the conduct need not be geared to deceive and mislead the plaintiff into inaction.... The fact that it has objectively produced this belief in good faith will suffice." L. Diez Picazo, *La Prescripcion en el Codigo Civil* 57, (Barcelona, 1964). We are not stating that this is perforce the situation here, but we cannot close our eyes to the fact that in analogous circumstances, a potential defendant may believe that, with the passing of time, both parties have lost interest in the matter. To punish this defendant with the loss of the right he may have to file a compulsory counterclaim would amount to promoting the proliferation of slow and stealthy plaintiffs.

If we examine the true foundation of the statute of limitations, we end up on the same road. Some commentators think that the *raison d'etre* of the limitation of actions originates in a presumption of abandonment or relinquishment on the part of the plaintiff. Most of them find support for the doctrine on purposes of social need and utility, which require that suits must be instituted within the specified terms. I Castan, *Derecho Civil Espanol, Comun y Floral* 833 (11th ed. 1971). To allow counterclaims in situations like the present one is not contrary to this last purpose. What would offend our sense of justice would be precisely the contrary. The construction of our codes and statutes should not be governed by a logic blind to the aims and needs of our legal and social system, but by the opposite. On this last one depends, in the last instance, the ability of our statutes to tune in to social change and the faculty to update them within the bounds established by the lawmaker. Appellants' thesis could find support, at the most, on a mechanical application of the theory on the abandonment of actions, but not on reasons of social utility. Under these last ones, it would be impossible to reward lateness in the filing of an action in the manner prayed for here. By doing this, our proceedings would become traps for the unwary, instead of the simple and flexible instruments of justice they are supposed to be. See: *Garcia* v. *Government of the Capital*, 72 P.R.R 133 (1951), where, under another section of the Civil Code, it was held that the defense of limitations may not be raised in third-party complaints.

For the foregoing reasons, the order of the Superior Court will be affirmed.

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No. 82-271

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

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Pursuant to Rules 22.5 and 22.6 of this Court's Rules, petitioners submit this Reply to Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

### I. THE DECISION OF THE COURT BELOW CONFLICTS WITH A RECENT DECISION OF THE NINTH CIRCUIT AND FAILS TO FOLLOW THIS COURT'S DECISIONS IN *AMERICAN PIPE* AND *TOMANIO*.

In its opinion of June 8, 1982,[1] the court below expressly recognized that if the rule stated in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), were

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[1] The decision of the court below, not reported at the time the Petition for Certiorari was filed, now appears at 681 F.2d 42 (1st Cir. 1982).

applied in the instant cases, all of the unnamed class members would be time-barred. Appendix, 14a. The court, however, refused to apply the rule, holding it inapplicable to class actions brought under 42 U.S.C. § 1983. Appendix, 17a.

Just over one month later, on July 14, 1982, the Court of Appeals for the Ninth Circuit reached exactly the opposite result on facts in all material respects identical to those in the instant cases. Thus, in *Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982), the Ninth Circuit, citing the "*need for procedural uniformity in all class actions in federal courts*," held that "the federal rule, not the state law, governs the tolling issue relevant here." 681 F.2d at 619; emphasis supplied. The "federal rule" applied by the court was the one established by this Court in *American Pipe*.[2]

In their Brief in Opposition at page 5, respondents argue that, in ignoring the rule of *American Pipe* and looking to the law of Puerto Rico instead, the court below "properly followed" this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980). Respondents, however, overlook the fact that in *Tomanio* there was no applicable federal rule. Indeed, this Court stated in

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[2] In the Petition for Writ of Certiorari at pp. 9-10 n. 10, petitioners cited the *Pavlak* case. At that time, however, only the summary of the decision appearing in the United States Law Week, which stressed a different aspect of the Ninth Circuit's holding, was available to petitioners. *See* 51 U.S.L.W. 2068 (August 3, 1982). Since then, however, petitioners have had an opportunity to review the full text of the decision, and such review has made clear that a direct conflict exists between *Pavlak* and the decision below. Under the provisions of Rule 22.6, therefore, petitioners call this important decision to this Court's attention.

*Tomanio* that, under 42 U.S.C. § 1988, federal courts must look to state law only "when federal law provides no rule of decision for actions brought under § 1983." 446 U.S. at 484-85; Petition for Certiorari at 11. *American Pipe* clearly provides the applicable "rule of decision" for class actions brought in federal courts. The Ninth Circuit correctly applied that rule. The contrary and conflicting decision of the court below should be corrected.[3]

Lastly, respondents attempt to dismiss *American Pipe* as merely "a judge-made tolling rule developed . . . for anti-trust actions." Brief in Opposition at 7. The court below distinguished *American Pipe* on similar grounds. Appendix, 17a. That position, however, flatly ignores this Court's statement in *American Pipe* that it was there concerned with "an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts," 414 U.S. at 540, and that the rule adopted was "the rule most consistent with federal class action procedure." *Id.*

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[3] There is simply no basis for respondents' statement that petitioners "in effect [ask] this Court to overrule" *Tomanio*. Brief in Opposition at 7. Indeed, even if *Tomanio* does not in fact *require* application of the federal rule of *American Pipe* to federal class actions brought under § 1983, it clearly does not require the application of state law in lieu thereof, nor does it prohibit use of the federal rule to promote procedural uniformity. In fact, in *Pavlak* v. *Church*, *supra*, the Ninth Circuit noted that "[t]he issue . . . [of] whether state or federal rules of limitation apply when the reason for tolling arises from federal procedural policy, was not raised or addressed in *Tomanio*." 681 F.2d at 619. Thus, as petitioners noted in their Petition for Certiorari at page 12 n. 12, should this Court perceive a need to reconcile its holdings in *American Pipe* and *Tomanio*, this case presents an appropriate vehicle for that purpose.

at 554. Furthermore, numerous courts have applied the rule of *American Pipe* as a rule of general applicability to class actions brought in federal court, including actions brought under 42 U.S.C § 1983. *See* cases cited in Petition for Certiorari, p. 9 n. 10. In fact, the narrow reading of *American Pipe* urged by respondents has never been adopted by any court, except the court below in its decision in these cases.[4]

## II. THE PENDENT STATE CLAIMS CANNOT BE RELIED ON TO SUPPORT THE RESULT BELOW.

Respondents argue, for the first time in these lengthy proceedings, that their "pendent Puerto Rico statutory claims" are alone sufficient to support the result below. Brief in Opposition at 10-12. No authority is cited to support this novel argument, nor did the court below rest its decision on any such pendent claims; indeed, the argument was not even raised before the court below. In any event, it is clear that if respondents' claims under § 1983 were untimely when filed, and thus should have been dismissed, the pendent state claims should have been dismissed as well. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966); *Hupp* v. *Gray*, 500 F.2d 993, 998 (7th Cir. 1974) (where federal claim was time-barred, district court properly dismissed pendent state claims).

---

[4] Respondents' attempt to justify that result by citing the Advisory Committee's Note on Proposed Rule 23 is indeed curious. Brief in Opposition at 7. The quoted language, purportedly drawn from this Court's decision in *American Pipe*, is incomplete, taken completely out of context, and grossly misleading. *See* 414 U.S. at 554 and n. 24.

## III. RESPONDENTS HAVE FAILED TO RECONCILE THE DECISION BELOW AS TO THE TIMELINESS OF ORTIZ RIVERA'S CLASS ACTION COMPLAINT WITH THIS COURT'S DECISIONS IN *CHARDON* v. *FERNANDEZ* AND *DELAWARE STATE COLLEGE* v. *RICKS*.

Ortiz Rivera declared in a sworn statement filed with the District Court that he was notified on May 27, 1977, over a year before he filed his suit on June 19, 1978, that a final decision had been made not to renew his temporary appointment for the 1977-78 school year. Appendix, 81a-83a. The District Court, contrary to respondents' contention, did not find as a matter of *fact* that he did not receive notice on that date. Rather, it concluded, as a matter of *law*, that the notice he received on May 27, 1977, was not sufficient to start the statute of limitations running on his cause of action under § 1983. That conclusion, reached before this Court decided *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), and *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), rested on the erroneous view that a cause of action under § 1983 does not accrue until the date the plaintiff "is *officially informed* that he is being demoted and he is aware of the reasons for [the] demotion." Appendix, 79a; emphasis supplied.

The court below not only upheld the result reached by the District Court, but expressly adopted its reasoning as well. Appendix, 5a. That reasoning cannot be squared with this Court's decisions in *Ricks* and *Fernandez*. In *Ricks*, this Court held that the limitations period commenced "at the time the tenure decision was made and communicated to Ricks." 449 U.S. at 258. Similarly, in *Fernandez*, this Court looked to the date respondents were "notified . . . that a final decision had been made to terminate their appointments," in determining the date on which their cause of action accrued. 454 U.S. at 8. In

light of those decisions, there is no basis for the court below to have rejected the notice Ortiz Rivera received from the School Superintendent on May 27, 1977, more than one year before his class suit was filed on June 19, 1978.

## CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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## RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION

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## RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION

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Because Petitioners in their Reply Brief purport to raise a new matter pursuant to Rule 22.6 of this Court's Rules, Respondents submit this short Supplemental Brief in Opposition to Petition for Certiorari.

### THERE IS NO CONFLICT BETWEEN THE DECISION OF THE FIRST CIRCUIT BELOW AND A RECENT DECISION OF THE NINTH CIRCUIT

Petitioners attempt to characterize the Ninth Circuit's recent decision in *Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982) as standing for the proposition that the tolling rule of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) applies to Section 1983 actions. However, this is not so.

The *Pavlak* case dealt primarily with a very different issue:

> "The question here is whether, after certification of a Rule 23(b)(3) class is denied, a plaintiff, who was a member of the putative class, may claim that the statute of limitations was tolled pending determination of the certification motion *so that she may file an independent suit.*"

The Ninth Circuit then went on to hold:

> "*American Pipe* permitted a toll of the statute of limitations for a class member who intervened in the action in which class certification was denied, and *we conclude that its rationale cannot be extended to those who do not intervene, or try to do so.*"

681 F.2d at 617-618 (emphasis added). Needless to say, this issue in *Pavlak* is not now before this Court in these cases.

Moreover, as to the tolling issue which Petitioners attempt to raise in these cases, the Ninth Circuit in *Pavlak* made clear that its view of the tolling rule in *American Pipe* would also be followed *as a matter of state law* by the Idaho courts. Thus, the Ninth Circuit asserted:

> "Our Lexis research into Idaho law has disclosed no statute or court decision on point, although Idaho contains a procedural rule identical to Fed.R.Civ.P. 23. We note that we therefore have no basis for identifying the Idaho law on this subject, should we conclude that it is relevant. *We do believe that the courts of Idaho would adopt American Pipe and our reading of it, as the better rule.*"

681 F.2d at 619-620 n.2 (emphasis added).

Consequently, *Pavlak* does not hold what Petitioners claim it does, and there is in reality no conflict between *Pavlak* and the First Circuit's decision in these cases. To

the contrary, state tolling law was properly relied upon by both courts. *See Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980).

## CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.*

Respectfully submitted,

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*Respondents are also constrained to rebut Petitioners' claim that Respondents "for the first time" make the argument that their pendent Puerto Rico statutory claims are sufficient to support the result below. *See* p. 4 of Petitioners' Reply Brief. This is simply untrue. At pp. 49-50 of their Brief in the First Circuit, Respondents made this very argument.

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## QUESTIONS PRESENTED

1. Whether the rule established by this Court in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), that the filing of a purported class action in federal court suspends the running of the statute of limitations for unnamed class members until a decision is reached whether to certify the class, and that following a denial of certification the statute resumes running again, is applicable to a purported class action brought in federal court seeking relief under 42 U.S.C. § 1983.

2. Whether this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), precludes application of the rule of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), to purported class actions brought in federal court seeking relief under 42 U.S.C. § 1983.

## PARTIES TO THE PROCEEDING

The petitioners are Carlos Chardon, individually, Maria Socorro Lacot, as the current Secretary of Public Education for the Commonwealth of Puerto Rico (by automatic substitution when Mr. Chardon, who was sued individually and as Secretary of Education, resigned his position), and Oscar Ramos, individually and as the Assistant Secretary for Personnel of the Department of Education of the Commonwealth of Puerto Rico.

The respondents are the following thirty-six persons, whose cases were considered in one appeal below, Nos. 81-1567 and 81-1607:

1. Aurora Sierra Pizarro
2. Virginia Otero Arroyo
3. Juan Fumero Soto
4. Dora Castro de Aguilar
5. Reinaldo Rodriguez Solivan
6. Elba Rosario de Bravo
7. Ramon Norat Zayas
8. Charles H. Quiles Mariani
9. Bienvenido Rivera Diaz
10. Carmen M. Morales Hernandez
11. Juan Rivera Pagan
12. Joaquin Cruz Mendez
13. Ursula Aguilar Quintero
14. Aminta Rivera Cardona
15. Roberto Cruz Cruz
16. Nelson Velez Quinones
17. Cristina Cancel Cuevas
18. Maria D. Guerro Navarro
19. Francisco Bonilla Ocasio
20. Heriberto Gallardo Gutierrez
21. Julio E. Colon
22. Aida Rodriguez Rios

23. Carmen Nunez Rivera
24. Carmen L. Negron Marin
25. Carmen Garcia Rosado
26. Noelia Torres de Cantres
27. Antonio Rodriguez Rivera
28. Jose E. Aponte de la Torre
29. Carmen H. Montez Velez
30. Nilsa Cardona Flores
31. Elba M. Colon Torres
32. Ana Mercedes Ortiz Colon
33. Sylvia M. Denis
34. Bienvenido Castro del Valle
35. Santiago Gonzalez Velasquez
36. Angela Colon Santiago

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## BRIEF OF PETITIONERS

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### OPINIONS BELOW

The opinion of the court below dated June 8, 1982, is reported at 681 F.2d 42 and is reproduced in the Joint Appendix ("J.A.") at pages 125a-157a. That court's unreported order of July 6, 1982, modifying its judgment of June 8, 1982, is reproduced at J.A. 158a. The court's unreported orders of July 6, 1982, and July 28, 1982, denying the petitions for rehearing of petitioners herein, are reproduced at J.A. 159a-160a and 161a, respectively.

The May 7, 1981, opinion of the district court, which was reviewed on appeal by the court below, is reported at 514 F. Supp. 339 and is reproduced at J.A. 87a-107a. The district court's unreported order of May 7, 1981, which accompanied its opinion, is reproduced at J.A. 84a-86a. The district court's unreported Final Order and Judg-

ment, dated July 24, 1981, is reproduced at J.A. 108a-111a. The unreported judgment entered by the Clerk of the district court in accordance with the Final Order and Judgment, dated July 29, 1981, is reproduced at J.A. 114a-116a. The district court's unreported order of January 7, 1982, entered *nunc pro tunc* to July 29, 1981, is reproduced at J.A. 121a-124a.

## JURISDICTION

The judgment of the court below was entered on June 8, 1982. Petitioners' filed a Petition for Rehearing which was denied on July 6, 1982. (J.A. 159a) Eight respondents filed a Petition for Rehearing and Modification of Judgment which the court below granted on July 6, 1982, modifying its judgment accordingly. (J.A. 158a) Petitioners thereafter filed a Petition for Rehearing on Modification of Judgment which the court below denied on July 28, 1982. (J.A. 161a) Petitioners filed their petition for writ of certiorari on August 16, 1982. The petition was granted by this Court on November 8, 1982. (J.A. 162a) This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

### 42 U.S.C. § 1983 (Supp. IV 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Col-

umbia shall be considered to be a statute of the District of Columbia.

**42 U.S.C. § 1988 (Supp. IV 1980)**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

## STATEMENT OF THE CASE

These thirty-six consolidated civil rights cases are related to the cases decided by this Court last term in

*Chardon* v. *Fernandez*, 454 U.S. 6 (1981),[1] and arose out of essentially the same facts. (J.A. 127a)

The petitioners are Carlos Chardon, individually, Maria Socorro Lacot, the current Secretary of Public Education (by automatic substitution when Mr. Chardon resigned that position), and Oscar Ramos, individually and as the Assistant Secretary for Personnel of the Department of Education.

The respondents held non-tenured administrative positions in the Puerto Rico Department of Education for the 1976-77 school year. (J.A. 127a) These respondents were notified—on or after June 17, 1977—that their appointments would not be renewed for the 1977-78 school year and that, instead, they would be reinstated to the tenured teaching positions they had previously held in the Department. (J.A. 127a, 155a, 158a)

On June, 19, 1978, Jose Ortiz Rivera, not a respondent herein,[2] filed a purported class action against Chardon and Ramos in the United States District Court for the District of Puerto Rico. (J.A. 128a) Ortiz Rivera claimed that the Department of Education had failed to reappoint him, and the members of the class he purported to represent, because of their political affiliation. (J.A. 13a, 128a)

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[1] In *Fernandez*, this Court reversed the judgments previously entered by the Court of Appeals for the First Circuit and remanded the cases for further proceedings. 454 U.S. at 8. On remand, the Court of Appeals decided the *Fernandez* cases and the instant *Fumero Soto* cases in the same opinion. (J.A. 126a, 127a)

[2] Ortiz Rivera was named as a respondent in the petition for writ of certiorari. This Court, however, limited the writ of certiorari to questions 1 and 2 presented in the petition, thus denying the writ as to the third question. Questions 1 and 2 did not involve Ortiz Rivera; Question 3 pertained solely to the timeliness of his complaint. Accordingly, Ortiz Rivera is not a respondent herein.

Ortiz Rivera sought relief under 42 U.S.C. § 1983 and asserted pendent claims under 18 L.P.R.A. §§ 214, 249a, 249e. (J.A. 128a) Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201 and 2202. (J.A. 7a)

On August 21, 1978, the district court denied class certification on the ground that the class was not so numerous as to make joinder impracticable. (J.A. 16a, 128a-129a) No appeal, either interlocutory or after the entry of final judgment in the case, was taken from this denial of certification. On October 5, 1978, Ortiz Rivera moved the district court for leave to amend his complaint to name one hundred twenty of the purported class members as co-plaintiffs in his suit. (J.A. 29a) That motion was denied on November 24, 1978. (J.A. 49a) This ruling also was not appealed. Thereafter, on dates ranging from January 10 to January 31, 1979, ninety individual plaintiffs, including the respondents herein, filed separate complaints under Section 1983, thus bringing to ninety-one the total number of separate lawsuits then pending in the district court. Chardon and Ramos filed an answer in each case, and in each such answer stated as an affirmative defense that the action was barred by the applicable statute of limitations. (J.A. 80a, 131a)

In Puerto Rico, the limitations period applicable to a claim under 42 U.S.C. § 1983 is one year. 31 L.P.R.A. §5298(2). (J.A. 131a) The district court initially dismissed thirty-six cases as time-barred. (J.A. 130a) In each of those cases the plaintiff had received notice of the non-reappointment decision more than one year before Ortiz Rivera filed his purported class suit.[3] (J.A. 144a) These

[3] Thus, the filing of the purported class action could have had no tolling effect on the running of the statute of limitations for those plaintiffs.

cases became the *Fernandez* cases, in which the Court of Appeals for the First Circuit held that the limitations period began to run, not when notice of non-reappointment was received, but when the plaintiffs' appointments ended. *Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981). This Court reversed, holding that the plaintiffs' causes of action under Section 1983 accrued on the dates that they were "notified . . . that a final decision had been made to terminate their [temporary] appointments." *Chardon* v. *Fernandez*, 454 U.S. at 8. As noted above, this Court remanded the *Fernandez* cases for further proceedings.

After the *Fernandez* cases had been dismissed by the district court, and while those cases were on appeal, the remaining fifty-five individual cases—the *Fumero Soto* cases—were consolidated for trial. (J.A. 130a) The district court bifurcated the trial into liability and damage phases, reserving its decision on the statute of limitations defense. (J.A. 130a) After trial in January 1981, the jury returned a verdict in favor of plaintiffs on the question of liability. (J.A. 130a) Thereafter, in light of the jury's answers to certain interrogatories, the district court found Chardon and Ramos immune from individual liability, but ordered the Department of Education to reinstate all the plaintiffs to their previous administrative positions with full back pay. (J.A. 130a-131a) Judgments were entered accordingly.[4] (J.A. 108a, 121a) Petitioners herein appealed asserting, *inter alia*, that all the suits

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[4] The district court, in entering judgment, necessarily rejected the statute of limitations defense on which it had reserved decision prior to trial.

were filed after the statute of limitations had expired and were thus time-barred.[5]

The court below issued its opinion on June 8, 1982, deciding the remanded *Fernandez* cases,[6] together with the *Fumero Soto* cases. With respect to the *Fernandez* cases, the court vacated the judgments it had previously entered and remanded those cases to the district court with instructions to dismiss. (J.A. 155a) With respect to the *Fumero Soto* cases, the court reversed twenty-six of them and remanded them to the district court with instructions to dismiss. (J.A. 155a) The plaintiffs in those cases were in precisely the same position as the *Fernandez* plaintiffs (*i.e.*, their one-year limitations period had expired before the class suit was filed) and they were therefore found to be time-barred. (J.A. 144a)

As to the remaining *Fumero Soto* plaintiffs, who had received notice after June 19, 1977, the court found their suits to have been timely filed and remanded them to the district court for assessment of compensatory damages

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[5] Petitioners also appealed on the grounds that the district court erred in refusing to enter judgment for them notwithstanding the verdict, and that the back pay award entered against the Department of Education violated the Eleventh Amendment to the United States Constitution. Respondents cross-appealed contending that the defendants below did not enjoy individual immunity. The court below did not find error in the district court's refusal to grant judgment notwithstanding the verdict, but reversed the back pay award, finding it in violation of the Eleventh Amendment. (J.A. 154a)

[6] After this Court issued its decision in *Fernandez*, the court below directed the parties to submit briefs on the question whether the statute of limitations had been tolled in any of those cases and whether that issue should be certified to the Supreme Court of Puerto Rico. The court below concluded that no tolling had occurred, and that the issue did not need to be certified. (J.A. 143a-144a)

against the individual defendants, Chardon and Ramos.[7] (J.A. 144a, 154a, 155a) The court held that it was bound to apply Puerto Rico law, rather than the federal rule of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), in resolving this issue. Based on its interpretation of Puerto Rico law, the court held that the filing of the class suit by Ortiz Rivera tolled the running of the statute of limitations as to all unnamed class members, and that, after class certification was denied, each unnamed class member then had another full year within which to bring suit. (J.A. 136a, 144a)

Chardon and Ramos petitioned for rehearing, *inter alia*, on the ground that the court had erred in looking to Puerto Rico law, rather than applying the federal rule, to determine the effect of the denial of class certification on the unnamed class members. The court denied the petition on July 6, 1982. (J.A. 159a)

Eight of the *Fumero Soto* plaintiffs whose judgments had been reversed also petitioned for rehearing and modification of judgment on the ground that their complaints were not time-barred, even though they had received notice of non-reappointment on June 17, 1977—more than one year prior to the filing of the class suit. They argued that since June 17, 1978—the date on which the one-year limitations period expired in their cases—fell on a Saturday, they were entitled under Puerto Rico law to benefit from the filing of the class suit on Monday, June 19, 1978. The plaintiffs had advanced as authority for their position, 1 L.P.R.A. § 72, which provides:

> "The time in which any act provided by law is to be done is computed by excluding the first day, and

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[7] The mandate of the court below has been stayed pending final disposition by this Court. *See* Rule 41, Fed. R. App. P. (J.A. 161a)

including the last, unless the last day is a holiday, and then it is also excluded."

Without offering petitioners an opportunity to respond, the court below granted plaintiffs' petition and modified its judgment accordingly, thus bringing to thirty-seven the number of plaintiffs held to have timely filed their complaints. (J.A. 158a) Chardon and Ramos petitioned for rehearing on the modification of judgment, pointing out that plaintiffs failed to mention, or even acknowledge, 1 L.P.R.A. § 71, which defines "[h]olidays, within the meaning of sections 71-73" of Title 1. Saturdays are not included in that definition. The court on July 28, 1982, denied the petition, holding that the federal rules controlled, and that Fed. R. Civ. P. 6 expressly excludes Saturdays from such computations and Fed. R. App. P. 26 contains the same exclusion. (J.A. 161a)

## SUMMARY OF ARGUMENT

In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), this Court determined the effect of both the filing of a proposed class action and a subsequent denial of class certification on the running of a statute of limitations. This Court held that when a complaint proposing a class action is filed, it has the effect of tolling the statute of limitations for all unnamed members of the proposed class. The statute of limitations is suspended for the period of time it takes the district court to determine whether a class action may appropriately proceed. If class certification is denied, the limitations period for each unnamed member of the proposed class resumes running, and such persons must successfully intervene in the ongoing individual action during the time remaining in that period in order to preserve their causes of action. The court below recognized and understood the *American Pipe* rule. It rejected application of the rule, however,

finding that in this action, initiated as a proposed class action under 42 U.S.C. § 1983, it was bound to apply state law to determine the effects of the class action complaint and the denial of class certification on the applicable state statute of limitations.

The decision of the court below was purportedly based on this Court's holding in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980). The court below failed to recognize that this case is distinguishable from *Tomanio*, since it was initiated as a class action, thus bringing it squarely under the federal procedural rule established in *American Pipe*. In addition, the court below failed to note that the result in *Tomanio* was dictated by 42 U.S.C. § 1988 and that, in this case, Section 1988 dictates application of the federal rule of *American Pipe*. Finally, other important federal policies which supported the application of state law in *Tomanio*, support application of the federal rule of *American Pipe*, rather than state law, in this case.

## ARGUMENT

### I. Respondents' Actions Are Time-Barred Under The Rule Of *American Pipe*

As noted above, Ortiz Rivera filed the purported class action on June 19, 1978. (J.A. 128a) On that date, the purported class members, including respondents herein, had between one day and one hundred thirty-eight days remaining in their respective limitations periods. (J.A. 132a) On August 21, 1978, the district court denied class certification, finding that the asserted class was not so numerous as to make joinder impracticable. (J.A. 16a, 128a-129a) After the denial of class certification, none of the respondents moved to intervene in Ortiz Rivera's individual suit. Instead, on dates between January 10 and

January 31, 1979—more than one hundred thirty-eight days after class certification was denied—each respondent herein filed a separate complaint against Chardon and Ramos. (J.A. 2a-4a, 132a) Under this Court's decision in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the statute of limitations had thus run against all of the respondents, and their complaints are time-barred.

In *American Pipe*, the State of Utah, with eleven days remaining in the applicable one-year limitations period, filed an antitrust class action purporting to represent various state and local government entities. There, as here, the district court refused to certify the class on the ground that it was not so numerous as to make joinder impracticable. Between the time the original suit was filed and the date class certification was denied, the applicable limitations period expired. Unlike the instant case, however, some eight days after the denial of class certification—and thus within the eleven days which remained in the limitations period on the date the class suit was filed—various members of the purported class moved to intervene in Utah's original suit. The district court denied these motions on the ground that they were untimely. The Court of Appeals for the Ninth Circuit reversed. This Court, in affirming the Ninth Circuit, stated as follows:

> "[A]t least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U.S. at 552-53.

Thus, in *American Pipe* this Court established the effect of both the filing of a proposed class action and the denial of class certification on the running of a statute of limitations.

The court below clearly recognized that if the rule of *American Pipe* were applied in the instant case, all of the unnamed class members would be time-barred:

> "Under *American Pipe*, the one-year statute of limitations would have been tolled on June 19, 1978, when Ortiz Rivera filed his class action. The tolling would have ended, and the remaining portion of the limitations period would have recommenced running on August 21, 1978, when the district court declined to certify the class. Over half the plaintiffs in [the *Fumero Soto* and *Fernandez* cases combined] had received notice of demotion more than one year before Ortiz Rivera filed suit, so their claims would already have been time-barred. *The remaining plaintiffs would have had from one to one hundred and thirty-eight days to file individual complaints after August 21, 1978. The earliest individual complaints were not filed, however, until January 10, 1979, after expiration of the remaining one hundred and thirty-eight day period.*" (J.A. 132a) (emphasis added).

Although the court was generally correct in stating the rule of *American Pipe*,[8] and clearly understood what it

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[8] The tolling rule of *American Pipe* appears to extend only to unnamed members of the purported class "who make timely motions to intervene after the [district] court has found the suit inappropriate for class action status." *Id.* The lower federal courts are divided on the question of whether individuals who do not intervene in the original suit, but who file timely separate actions after class certification is denied, may avail themselves of the tolling rule established in *American Pipe*. Regardless of how that question is resolved, *cf. Parker* v. *Crown, Cork & Seal Co.*, 677 F.2d 391 (4th Cir.), *cert. granted*, No. 82-118, 51 U.S.L.W. 3352-53 (November 9, 1982), there

would mean to apply that rule in the instant case, it nevertheless held that in actions brought under 42 U.S.C. § 1983, the federal rule of *American Pipe* is not applicable since, in its view, the tolling issue should be governed by state law. (J.A. 133a, 134a) In that respect the court erred. The decision in *American Pipe* clearly controls the tolling issue in this case.

In *American Pipe*, this Court addressed "an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts." 414 U.S. at 540. The rule adopted by this Court was described as "the rule most consistent with federal class action procedure." *Id.* at 554. The Court further stated that "this interpretation of [Rule 23] is . . . necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56. In short, in *American Pipe* this Court established a uniform federal procedural rule applicable to class actions brought in the federal courts, and it has consistently been so interpreted and applied.[9]

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is no question in the instant case that if the rule of *American Pipe* applies, all of the respondents are time-barred, since none of them either intervened or filed an individual action within the time remaining in their respective limitations periods after class certification was denied.

[9] The tolling rule of *American Pipe* has been applied in a wide variety of contexts, including Section 1983 cases, *e.g.*, *Pavlak* v. *Church*, 681 F.2d 617, 618-20 (9th Cir. 1982), *petition for cert. filed*, No. 82-650, 51 U.S.L.W. 3320 (October 12, 1982); *Paxman* v *Campbell*, 612 F.2d 848, 855 (4th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1129 (1981); *McCarthy* v. *Kleindienst*, 562 F.2d 1269, 1272-75 (D.C. Cir. 1977); *Morton* v. *Charles County Board of Education*, 373 F. Supp. 394, 396 (D. Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975); cases brought under the federal securities acts, where, as in Section 1983 cases, state statutes of limita-

Thus, in *Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982), *petition for cert. filed*, No. 82-650, 51 U.S.L.W. 3320 (October 12, 1982), a case strikingly similar to the instant case, and one brought under Section 1983, the Ninth Circuit emphasized that "[t]here is need for procedural uniformity in all class actions in federal courts and under this principle the federal rule [of *American Pipe*], not the state law, governs the tolling issue relevant here." *Id.* at 619 (citation omitted). The decision in *Pavlak*, which is in direct conflict with the decision of the court below, is clearly the better rule. Indeed, there are sound reasons why the filing of a class action complaint and the subsequent denial of class certification, where class treatment is found inappropriate, should have the same effect in every federal class suit, whether brought under Section 1983 or some other statute.

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tions are applied, *e.g.*, *Wood* v. *Combustion Engineering, Inc.*, 643 F.2d 339, 346-47 (5th Cir. 1981); *Stull* v. *Bayard*, 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Arneil* v. *Ramsey*, 550 F.2d 774, 782 (2d Cir. 1977); *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 461 F. Supp. 999, 1011-12 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); and in many other types of cases as well, *e.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 391-92 (1977); *Parker* v. *Crown, Cork & Seal Co., Inc.*, 677 F.2d 391, 393-94 (4th Cir.), *cert. granted*, No. 82-118, 51 U.S.L.W. 3352-53 (November 9, 1982); *Jefferson* v. *H. K. Porter Co.*, 485 F. Supp. 356, 360-61 (N.D. Ala. 1980), *aff'd*, 648 F.2d 337 (5th Cir. 1981); *Green* v. *United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D. Pa. 1979) (Title VII cases); *Appleton Electric Co.* v. *Graves Truck Line, Inc.*, 635 F.2d 603, 609-10 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981) (I.C.C. rate refund enforcement); *Bantolina* v. *Aloha Motors, Inc.*, 75 F.R.D. 26, 32-33 (D. Hawaii 1977) (Truth-In-Lending); *Wright* v. *Califano*, 603 F.2d 666, 669 n.8 (7th Cir. 1979), *cert. denied.*, 447 U.S. 911 (1980) (Social Security Act benefits); *Stoddard* v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314, 329 (C.D. Cal. 1980) (Suits in Admiralty Act wrongful death); *Haas* v. *Pittsburgh National Bank*, 526 F.2d 1083, 1096-98 (3d Cir. 1975) (state and federal banking statutes).

Indeed, in *American Pipe*, this Court emphasized that Rule 23, Fed. R. Civ. P., where appropriately utilized, provides for a much-favored form of adjudication of disputes between multiple parties on one side and a single party on the other. Class actions serve the important values of judicial efficiency and economy by eliminating the need for a multiplicity of individual suits which are substantially similar, if not identical, in terms of the facts presented, the relief sought, and the legal principles to be applied.

The Court recognized in *American Pipe* that the salutary objectives and effects of Rule 23 would be frustrated but for the tolling rule adopted there. Specifically, the Court recognized that if the running of the statute of limitations on the individual causes of action of "members" of a proposed class was not tolled during the pendency of a court's determination as to whether the class should be certified, such of these "members" as were aware of the suit would file protective motions to intervene or join in the suit prior to such determination, in order to protect themselves from a time-bar if certification was later denied. These protective motions would result in the very multiplicity of individual actions in the courts which the class action mechanism was designed to prevent. As the Court explained:

> "A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is the principle purpose of the procedure. Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable. . . . [A] rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions." 414 U.S. at 553-54.

Thus, the tolling rule of *American Pipe* was adopted primarily for the purpose of protecting the judicial resources of federal district courts in cases where class actions have been proposed, at least until a determination has been made as to whether the case may properly proceed as a class action. This tolling rule does no more than preserve the status quo between the parties for the time it takes a court to decide whether to certify the class.[10]

It would appear that the overriding concerns for the objectives of judicial economy and efficiency are identical in each case in which class treatment is sought. Neither the subject-matter of the cause of action sought to be adjudicated as a class action, nor the source of the statute of limitations governing the cause of action have any bearing on these concerns or objectives. In short, that the proposed class action herein was initiated under 42 U.S.C. § 1983, and that Section 1983 cases are governed by a "borrowed" state statute of limitations, are factors irrelevant to the reasons for tolling during the pendency of a class certification determination.

By the same token, the purpose of the Federal Rules of Civil Procedure is to provide a uniform set of rules to "govern the procedure in the [federal] district courts," Rule 1, Fed. R. Civ. P. That purpose is frustrated if Rule 23 is applied differently from one case to another, depending on whether the underlying cause of action is governed by a state statute of limitations and, if so, what the coordinate tolling rules, if any, dictate as to the effect of the denial of class certification.

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[10] Rule 23(c), Fed. R. Civ. P., provides that, "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

Furthermore, the application of a uniform federal procedural rule, rather than an otherwise applicable state law, in federal question cases brought in the federal courts, has considerable precedent. For instance, in *Bomar* v. *Keyes*, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947), an action brought under the predecessor statute to Section 1983, the Second Circuit held that Rule 3, Fed. R. Civ. P., rather than state law, determined when an action was "commenced" for purposes of tolling the applicable state statute of limitations. This Court acknowledged the correctness of that holding in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), a diversity case. There, this Court distinguished the holding in *Bomar* on the ground that it "was a suit to enforce rights under a federal statute." *Id.* at 533. *Accord Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 751 n. 11 (1980).

Moreover, in diversity cases, where the use of state substantive law is mandated by the doctrine established in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), this Court has nevertheless applied federal law where necessary to give effect to important federal procedural policies. *See, e.g., Hanna* v. *Plumer*, 380 U.S. 460 (1965) (federal rule of procedure governs over conflicting state rule regarding method of service of process in diversity actions); *Byrd* v. *Blue Ridge Rural Electric Co.*, 356 U.S. 525 (1958) (federal rule applied in lieu of state procedural rule that would disrupt the federal system of allocating functions between judge and jury); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941) (federal rules concerning the power of a court to order a party to submit to a physical or mental examination regulated procedure, and would thus apply instead of law of either of the states whose law could be applied in a diversity case).

Finally, both in civil rights cases and in other contexts in which state statutes of limitations are applicable to actions arising under federal statutes, this Court and the lower federal courts have adopted and utilized federal procedural principles even where they are not directly related to policies embodied in the Federal Rules. *See Chardon* v. *Fernandez*, 454 U.S. 6 (1981) *and Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) (determination of when a cause of action accrues, and thus when applicable state statutes of limitations begin to run for actions under 42 U.S.C. §§ 1983 and 1981 is governed by federal law); *Cope* v. *Anderson*, 331 U.S. 461 (1947) *and Rawlings* v. *Ray*, 312 U.S. 96 (1941) (when applicable state statute of limitations begins to run for actions under federal statutes governing insolvent national banks is a federal question); *Chung* v. *Pomona Valley Community Hospital*, 667 F.2d 788, 791 (9th Cir. 1982); *Allen* v. *Amalgamated Transit Union Local 788*, 554 F.2d 876, 880 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973) (applying federal doctrine of "continuing violations" to toll the running of applicable state statute of limitations on actions under 42 U.S.C. § 1981).

In short, there is substantial precedent to support the proposition that "[f]ederal procedural rules will modify the application of state limitations policy in federal question cases." *Pavlak* v. *Church*, 681 F.2d at 619 (citation omitted).[11] Of course, the instant case, brought under 42

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[11] Even in this case, the court below, faced with a conflict between the Federal Rules and the law of Puerto Rico on computation of the state statute of limitations, flatly stated that "the date of filing is controlled by the Federal Rules and Federal Rules of Civil Procedure 6 expressly excludes from computation 'a Saturday, a Sunday or a legal holiday' and Federal Rules of Appellate Procedure 26 contains the same exclusion." (J.A. 161a)

U.S.C. § 1983, is a federal question case and thus the federal procedural rule of tolling established in *American Pipe* is properly applicable. The court below, however, refused to apply the rule of *American Pipe*, holding that, under this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), it was instead required to apply the law of Puerto Rico.

### II. This Court's Decision In *Board Of Regents* v. *Tomanio* Does Not Preclude Application Of The *American Pipe* Rule In This Case

In *Tomanio*, the plaintiff filed suit in federal court in New York under 42 U.S.C. § 1983 after the applicable statute of limitations had expired. She claimed that her action was not time-barred because the statute of limitations had been tolled by an earlier action filed in state court. Although New York law did not provide for tolling in the circumstances of her case, the district court nevertheless found that it would be appropriate to toll the running of the limitations period during the pendency of her state court litigation. 446 U.S. at 482. The Court of Appeals for the Second Circuit affirmed, "finding that the tolling of the statute was justified 'in the interests of advancing the goals of federalism.' " *Id.* at 483.

This Court granted certiorari, and reversed. On the basis of previous decisions, particularly *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and its interpretation of the mandate of 42 U.S.C. § 1988 in those cases, this Court found:

> "In § 1983 actions . . . a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law." 446 U.S. at 484.

Thus, the Court held that the lower courts were bound to apply state tolling rules to determine the tolling effect, if any, of the pendency of plaintiff's attempt to obtain relief in state court, unless the state tolling rules could be found "inconsistent" with federal law. *Id.* at 486. Looking to the relevant provisions of New York law, this Court found no provision which had the tolling effect found appropriate by the courts below. *Id.* Moreover, the policies underlying 42 U.S.C. § 1983, those being compensation of wronged parties and deterrence of unlawful acts violative of constitutional rights, were not found to be compromised by a refusal to toll the statute of limitations in the situation presented. Thus, the Court held that plaintiff's limitations period for her constitutional claim under Section 1983 was not tolled during the pendency of her state court litigation, and that her federal cause of action was time-barred.

Relying on the *Tomanio* decision, the Court of Appeals in the instant case held:

> "[A]pplication of state tolling rules to § 1983 claims is required by 42 U.S.C. § 1988, unless the state rules are inconsistent with the federal policies underlying § 1983. Thus in a § 1983 case, the federal rule and underlying reasoning of *American Pipe* are not generally applicable." (J.A. 134a) (citations omitted).

However, the court's reading of *Tomanio* was far too broad, and the holding in that case does not preclude the application of the "federal rule of *American Pipe*" herein.

Petitioners do not challenge the correctness of this Court's reasoning in *Tomanio*. That case, however, involved an individual suit, not a class action, and implicated no special federal procedural policies. Thus, there was every reason for the Court in that case to "[rely] on

the State's wisdom in setting a limit, and exceptions thereto," *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. at 464, in determining whether or not the applicable state statute of limitations was tolled by the plaintiffs' efforts to obtain relief from another source before bringing her federal cause of action.

Ortiz Rivera, however, filed his suit as a federal class action, thus bringing squarely into play the provisions of Rule 23, Fed. R. Civ. P., and the federal procedural policy embodied therein. As noted by the Ninth Circuit in *Pavlak* v. *Church*, *supra*, "[t]he issue [of] whether state or federal rules of limitation apply *when the reason for tolling arises from federal procedural policy*, was not raised or addressed in *Tomanio*." 681 F.2d at 619 (emphasis added). Since it is only because Ortiz Rivera's suit was filed as a class action that any tolling issue is presented as to respondents in this case, the court below clearly erred in relying on *Tomanio* to resolve that issue.

**A. 42 U.S.C. § 1988**

In reaching its decision in *Tomanio*, this Court followed the choice of law principles embodied in 42 U.S.C. § 1988, which are generally applicable in Section 1983 cases. Section 1988 provides, in pertinent part, as follows:

> "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS" . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as

> modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . ." 42 U.S.C § 1988 (Supp. IV 1980).

In *Tomanio*, noting the absence of any statute of limitations in Section 1983, this Court read Section 1988 as requiring the "borrowing" from state law of the limitations period governing the most analogous state law cause of action. 446 U.S. at 483-84. As already noted, *Tomanio* involved an individual action and presented no issues of important federal procedural policy. Thus, the Court could properly apply the general rule that, "[i]n § 1983 actions, a state statute of limitations and the coordinate tolling rules . . . are binding rules of law." *Id.* at 484.

Although Section 1988 required the application of state law in *Tomanio*, it does not require application of state law in this case. Here, unlike there, a governing federal procedural rule exists. Section 1988 provides that federal court jurisdiction in Section 1983 cases, "shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry [civil rights and their vindication] into effect." In *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), in which the Court had occasion to clarify the meaning of Section 1988, the Court reviewed the legislative history of the statute as follows:

> "Section 1988 was first enacted as a portion of § 3 of the Civil Rights Act of April 9, 1866, c. 31, 14 Stat. 27. . . . The initial portion of § 3 of the Act established federal jurisdiction to hear, among other things, civil actions brought to enforce § 1 [now 42

> U.S.C. § 1982]. *Section 3 then went on to provide that the jurisdiction thereby established should be exercised in conformity with federal law where suitable and with reference to the common law, as modified by state law, where federal law is deficient.*" 411 U.S. at 705 (emphasis added; footnote omitted).

It is clear both from the statute itself, and from the foregoing clarification, that resort to state law under Section 1988 is necessary only where federal law is somehow inadequate. This view was reiterated in *Tomanio*, where this Court noted that, "[i]n 42 U.S.C. § 1988, Congress 'quite clearly instructs [federal courts] to refer to state statutes' *when federal law provides no rule of decision for actions brought under § 1983.*" 446 U.S. at 484 (emphasis added; citations omitted).

Under these principles, it is clear that the federal rule of *American Pipe*, and not Puerto Rico law, provides the "rule of decision" to be applied to the tolling issue presented in this case.

This conclusion is supported by the analysis contained in *Cohen* v. *Board of Education of East Ramapo Central School District*, 536 F. Supp. 486 (S.D.N.Y. 1982). In *Cohen*, the court followed the holding of *Bomar* v. *Keyes*, *supra*, rejecting the defendants' assertion that under *Tomanio*, state law had to be followed in determining when plaintiff's action was "commenced" for purposes of tolling the applicable state statute of limitations. In distinguishing *Tomanio* and the precedents upon which that decision rests, the court stated:

> "The federal action cases, *Johnson* [v. *Railway Express Agency*], *Robertson* [v. *Wegmann*], and *Tomanio*, have all applied state law in areas in which federal law was deficient—*Johnson*: in respect to the effect of the filing of an EEOC complaint, *Robertson*: in respect to the death of a plaintiff, and *Tomanio*: in

> respect to the prosecution of an independent state action. *The deficiency in those cases was the absence of any federal law on the issue.* The issue became whether the state rule used to correct the deficiency was inconsistent with the Constitution or federal law. 42 U.S.C. § 1988 (1976). *In the present case, however, federal law does provide a solution and it is unnecessary to resort to state law.* Fed. R. Civ. Proc. 3 provides that '[a] civil action is commenced by filing a complaint with the court.' *Because federal law is not deficient on this subject, state law does not apply." Id.* at 495 (emphasis added; citations omitted).

Just as in *Cohen*, the federal rule of *American Pipe* "does provide a solution and it is unnecessary to resort to state law" in the instant case.

### B. Relevant Federal Policies

As demonstrated above, Section 1988 does not require the application of Puerto Rico law in this case; neither do the important federal policies addressed in *Tomanio*—uniformity, federalism, and repose.

Uniform application of the federal procedural rule established in *American Pipe* does not contradict *Tomanio*, where this Court refused to displace the state tolling rule in favor of an ad hoc federal rule solely to foster uniformity in Section 1983 cases. Citing similar analysis in *Robertson* v. *Wegmann*, the Court noted that since Section 1988 requires the use of state law under some circumstances in Section 1983 cases, non-uniformity is a necessary consequence of the statutory scheme. Thus, "the value of nationwide uniformity in areas of civil rights enforcement" was not seen as justification for adoption of an ad hoc federal common law tolling rule. 446 U.S. at 489.

It has been demonstrated here that Section 1988 does not require adoption of state law. Moreover, the argu-

ment for uniformity in this case transcends the subject-matter of the underlying cause of action. Procedural uniformity in the administration of federal class actions is appropriate regardless of the substance of the action in which Rule 23 is invoked. Such procedural uniformity is plainly not inconsistent with *Tomanio*.

Application of the uniform procedural rule in this case would not in any way compromise or infringe upon the policies underlying Section 1983. In *Robertson* v. *Wegmann*, *supra*, the Court identified those policies as follows:

> "The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." 436 U.S. at 590-91 (citations omitted).

*Accord Board of Regents* v. *Tomanio*, 446 U.S. at 488. The federal rule of *American Pipe* is entirely compatible with the policies of compensation and deterrence. Specifically, the tolling aspect of *American Pipe* protects the causes of action of all unnamed members of a potential Section 1983 class, until a court has the opportunity to determine the appropriateness of class treatment. Then, if class certification is denied, the members of the purported class still have as much time to take some action to protect their rights as they had when the class action complaint was filed. Clearly, this process is well suited for the vindication of civil rights.[12] This Court noted in *Toma-*

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[12] That the tolling aspect of the *American Pipe* rule comports with Section 1983 actions is demonstrated by its adoption and application as "Puerto Rico law" by the court below in this case. Generally, evidence of the compatibility of the *American Pipe* rule in its entirety with remedial principles like those embodied in Section 1983 is found in the uniform application of the rule in Title VII cases. *See, e.g.*, cases cited in n. 9, *supra*.

*nio*, addressing the state law which did not provide for tolling:

> "Neither of [the policies of compensation and deterrence] is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years." 446 U.S. at 488.

Similarly, *American Pipe* places no burden on plaintiffs' rights. They must do no more, after denial of class certification, than they would have had to do if a class suit had not been attempted—*i.e.*, take action to protect their rights within the time provided by the statute of limitations.

A second general federal policy discussed in *Tomanio* is federalism. In fashioning a federal tolling rule in that case, the two lower courts apparently believed that adoption of the New York tolling rule would undermine federalism because litigants would not be encouraged to resort first to state remedies. Rejecting this view, this Court stated:

> "We believe that the application of the New York law of tolling is in fact more consistent with the policies of 'federalism' invoked by the Court of Appeals, than a rule which displaces the state rule in favor of an ad hoc federal rule. The result reached by the District Court and Court of Appeals might encourage more plaintiffs with both state and federal constitutional claims to initially bring an action in the state courts. But it would just as surely frustrate the often complex combination of limitations and tolling provisions enacted by the State in question. While New York might have chosen a tolling rule designed to encourage prior resort to state-law remedies, it has not. Here New York has expressed by statute its disfavor of tolling its statute of limitations for one

> action while an independent action is being pursued. . . . the Court of Appeals' rule allowing tolling can scarcely be deemed a triumph of federalism when it necessitates a rejection of the rule actually chosen by the New York Legislature." 446 U.S. at 491-92 (citations omitted).

While this analysis at first blush seems to lend support to the court below in its look to Puerto Rico law, rather than application of *American Pipe*, closer scrutiny confirms that the court below clearly erred.

In *Tomanio*—unlike in the instant case—no "federal rule of decision" controlled the tolling issue presented. See Argument, pp. 21-24, *supra*. Under Section 1988, therefore, this Court properly looked to state law. Once there, the Court found that the applicable state tolling rule did not include any provision which would toll the statute of limitations for respondent's federal constitutional claims under Section 1983 during the pendency of her attempt to obtain analogous but different relief in the New York state courts. The Court found the absence of such a provision to represent a conscious choice of the State not to allow tolling in such situations. The Court concluded that enforcing this state choice would better foster federalism and rejected the federal common law tolling rule created by the lower courts.

Similarly, in this case, even assuming that reference to state law were appropriate, there is no statute or judicial decision in Puerto Rico which provides any basis for tolling the running of a statute of limitations for unnamed class members. The court below candidly conceded this point, noting that "[t]he question here is whether a class action is different from an individual complaint—at least as to unnamed plaintiffs in the class action. . . . The Puerto Rico Supreme Court has not ruled on this question,"

(J.A. 134a) and asserting that "in a § 1983 case, the federal rule and underlying reasoning of *American Pipe* are not generally applicable. In the instant case, though, *there is no discernible state rule.*" (J.A. 134a-135a) (emphasis added; citation omitted).

Thus, faced with exactly the situation which the lower courts in *Tomanio* had faced, the court below then searched for some basis to save respondents' causes of action. Instead of fashioning an ad hoc federal tolling rule—an approach expressly disfavored by this Court in both *Tomanio* and *Robertson* v. *Wegmann*, *supra*—the court below created and applied a wholly novel and unprecedented interpretation of Puerto Rico law in order to find respondents' individual actions timely filed. This approach finds no support in *Tomanio*.

As noted above, nothing in the applicable Puerto Rico tolling statute, 31 L.P.R.A. § 5303,[13] suggests that the filing of a class action complaint has the effect of tolling the statute of limitations for unnamed purported class members or that the denial of class certification will have the effect of starting the limitations period running anew for such persons. Under this Court's reasoning in *Tomanio*, the absence of such provision should have been viewed as evidence of the Commonwealth's determination that there is to be no tolling under the circumstances presented in this case, not as an invitation to create some tolling rule. Instead, asserting that the Puerto Rico class action rule was modeled on Federal Rule 23, the court below held that as a matter of Puerto Rico law, the filing

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[13] Section 5303, provides as follows:

"Prescription of actions is interrupted by their institution before the courts, by extrajudicial claim of the creditor, and by any act of acknowledgement of the debt by the debtor." 31 L.P.R.A. § 5303 (1968).

of the class action complaint would have the same effect as under the *American Pipe* rule—tolling the statute of limitations for all unnamed members of the purported class. Then, despite the fact that Section 5303 has *never* been interpreted to extend to anyone beyond the person who actually institutes an action before the courts, and even then "only with regard to identical causes of action," (J.A. 134a) the court below held that the denial of class certification had the effect of giving all unnamed class members a whole new one-year period within which to bring suit. (J.A. 136a) Creation of this ad hoc Puerto Rico tolling rule is in substance no different from the creation of an ad hoc federal tolling rule by the lower courts in *Tomanio*. Both approaches are wrong. The court below should have instead applied the well-settled uniform federal procedural rule established in *American Pipe*.

Finally, in *Tomanio*, as in many previous decisions, this Court addressed the important federal policy of repose. *See also American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554-55 (1974); *Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424, 428 (1965); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). That policy, embodied in statutes of limitations, was explained as follows:

> "[T]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *American Pipe*, 414 U.S. at 554, *quoting Order of Railroad Telegraphers*, 321 U.S. at 349.

In the instant case, as the court below noted, when class certification was denied on August 21, 1978, the individual respondents, if *American Pipe* applies, had from one day to one hundred thirty-eight days remaining in their individual one-year limitations periods in which to

take action to prosecute their civil rights claims. (J.A. 132a) Defendants' rights to repose thus vested as to each respondent on the various dates within that period on which the statute of limitations expired on each individual cause of action. Under the court's ruling below, however, all of the respondents received an additional 365 days in which to take action to protect their rights.[14] Having thus defeated defendants' rights to repose, the court nevertheless declared that, "the class action . . . did not disturb any protected repose defendants enjoyed with respect to § 1983 claims, and commencement of a new limitations period after the pendency of the class action would not interrupt any further repose." (J.A. 136a) That statement not only contains an erroneous conclusion of law, but clearly ignores reality.[15]

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[14] As pointed out in n. 8, *supra*, the court below went beyond this Court's holding in *American Pipe* by allowing respondents herein to file individual suits after the denial of class certification, rather than limiting them to timely intervention.

[15] The phrase "after the pendency of the class action" is premised on an erroneous view of the applicable law. The tolling principle of *American Pipe*, adopted and applied by the court below as a matter of Puerto Rico law, does not have the effect of creating a class action. *American Pipe*, by means of a legal fiction, allows a suit to be treated as representative in nature for only so long as it takes the district court to decide whether it can actually proceed as a class action. It is clear, however, that in order for a suit to become a class action, it must satisfy all of the standards of Rule 23(a), fall into one of the three categories provided for in Rule 23(b), and be certified as such under Rule 23(c). Having failed to satisfy at least one of the threshold standards of Rule 23(a) (numerosity), this action could not be certified and was never a class action.

Concerning the assertion that the awarding of a new limitations period "would not interrupt any further repose," a brief review of the record will demonstrate just how incorrect this is. The court noted that respondents had from one to one hundred thirty-eight days in

*American Pipe* makes clear that the policy of repose will be qualified where necessary to give effect to other important federal interests. In this case, however, application of the *American Pipe* rule would, in the words of the court below in addressing a different issue, "give greater protection to defendants' repose without unduly limiting plaintiffs' ability to sue." (J.A. 140a) As previously discussed, the *American Pipe* rule is entirely compatible with the remedial purposes of Section 1983 and of civil rights legislation generally. It places no burden on Section 1983 plaintiffs beyond that which already rests on them—to exercise due diligence to protect their rights during the time allotted by the applicable statute of limitations. This respondents herein failed to do.

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which to act after denial of certification under the *American Pipe* rule. A breakdown of the actual remaining periods presents a much more realistic picture. One respondent had 138 days, but no other respondent had more than 50 days. Of these, one respondent had 50 days, one had 42 days, and two had 22 days. Of the remaining respondents, ten had between 11 and 17 days. Thirteen respondents had between one and five days. Finally, as reviewed previously, eight respondents were already out of time when the purported class action was filed. They were saved only because, since their limitations periods expired on June 17, 1978, a Saturday, they were extended until the following Monday, June 19, 1978, the date on which the complaint herein was filed. Thus, but for the ruling below, defendants' rights to repose would have vested long before January 10, 1979, the date on which the first among these respondents finally filed their individual suits.

Moreover, the court's attempt to gloss over this grossly unfair result by suggesting that, "defendants are Puerto Rican, and there is no unfair surprise in following Puerto Rican law," *Id.* (J.A. 136a), is wholly disingenuous. Defendants could hardly have anticipated the result reached, since the novel and unprecedented "Puerto Rican" rule of decision never existed until its creation by the First Circuit *in this case.*

Thus, uniformity, federalism, and repose, important federal policies accorded decisional significance by this Court in *Tomanio*, not only do not require the application of Puerto Rico law in this case, but rather militate in favor of using the federal rule of *American Pipe*.

## CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment entered by the United States Court of Appeals for the First Circuit in this case.

Respectfully submitted,

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No. 82-271

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

**On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

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## COUNTER QUESTIONS PRESENTED

Since *American Pipe* holds that the "precise tolling effect" of denial of federal class action certification is determined by the limitations scheme governing the substantive cause of action involved, should not the "precise tolling effect" of loss of class character of a 42 U.S.C. § 1983 federal class suit be governed by the relevant forum state's limitations scheme pursuant to 42 U.S.C. § 1988 and *Tomanio*?

If *American Pipe's* tolling rule of suspension is a *judicial* tolling rule generally applicable to federal class suits denied class certification, should not state tolling law nevertheless be applicable to 42 U.S.C. § 1983 federal class suits because a *judicial* tolling rule is not a "law of the United States" within the meaning of 42 U.S.C. § 1988?

If *American Pipe's* tolling rule of suspension is a Rule 23 interpretation generally applicable to federal class actions denied class certification, should not Rule 23 nevertheless be interpreted as inapplicable to § 1983 federal class suits in order to avoid a violation of the Rules Enabling Act?

If *American Pipe's* tolling rule of suspension is a Rule 23 interpretation generally applicable to federal class suits denied class certification, then where Puerto Rico tolling law provides for renewal of the relevant limitations period as a matter of substantive right, does not Rule 23 as applied to a 42 U.S.C. § 1983 federal class suit filed in Puerto Rico abridge or modify substantive rights of unnamed members of the class in violation of the Rules Enabling Act?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-271

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CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

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**On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

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## BRIEF OF RESPONDENTS

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### OTHER STATUTORY PROVISIONS INVOLVED

**28 U.S.C. § 2072**

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

**31 L.P.R.A. § 5303 (Puerto Rico)**

Prescription of actions is interrupted by their institution before the courts, by extrajudicial claim of the creditor and by any act of acknowledgment of the debt by the debtor.

## COUNTER STATEMENT OF THE CASE

Respondents (hereafter called "Plaintiffs") wish to direct the Court's attention to the following:

1. The class action filed on June 19, 1978 by Ortiz Rivera was brought as a Rule 23(b)(1) and (2) suit. (J.A. 8a) After the District Court denied certification for lack of numerosity on August 21, 1978, there was filed a motion for reconsideration (J.A. 18a-24a) which was denied on September 29, 1978, followed next by a motion for leave to filed an Amended Complaint joining all the Plaintiffs (J.A. 29a-48a) which was denied on November 24, 1978. Finally, there was a motion for reconsideration of the latter (J.A. 54a-72a) which was denied on December 11, 1978.

2. The jury's general verdict rendered in favor of the Plaintiffs on the question of the violation by Petitioners

(hereafter called "Defendants") of their First Amendment rights under § 1983 was also premised on Defendants' violation of Plaintiffs' rights under 18 L.P.R.A. § 249(e).[1] The latter statute served as the basis for Plaintiffs' Puerto Rico pendent statutory claims (J.A. 11a-12a) regarding which the jury was specifically instructed in these cases. (Tr. 727-28). Defendants never asked the District Court, as they could have, to inquire whether the jury's verdict was based on § 1983, on § 249(e), or on both. On appeal, Plaintiffs raised this matter at pp. 49-50 of their Brief in the First Circuit and at pp. 10-12 of their Brief in Opposition to Petition for Certiorari.

3. With respect to computing the Puerto Rico one-year limitations period, Plaintiffs did not, contrary to Defendants' assertion at pp. 8-9 of their Brief, rely on 1 L.P.R.A. § 72's "holiday" language. Rather, Plaintiffs relied on Rule 6 of the Federal Rules of Civil Procedure and on Rule 68.1 of the Puerto Rico Rules of Civil Procedure, both of which exclude the last Saturday and Sunday for time computation purposes under "any applicable statute." Plaintiffs' Petition for Rehearing and Modification of Judgment in the First Circuit at pp.2-3.

## SUMMARY OF ARGUMENT

These cases provide this Court with an opportunity to promote the important federalism interests protected by

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[1] 18 L.P.R.A. section 249(e) reads as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status."

42 U.S.C. § 1988 and at the same time to affirm the vindication by a Puerto Rico federal jury of the Plaintiffs' First Amendment rights under 42 U.S.C. § 1983. Thus this Court need not choose between § 1988 federalism interests and § 1983 policies.

In *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), this Court, following earlier decisions, interpreted 42 U.S.C. § 1988 as requiring the use of the forum state's limitations and tolling law in § 1983 actions brought in federal court. The Court emphasized the Congressional intent underlying § 1988, the intimate relationship between a state's limitation scheme and its tolling law, and the strong federalism interests in this use of state law.

In the present cases, the Plaintiffs filed their individual § 1983 suits well within a year after the denial of certification for lack of numerosity of a timely filed § 1983 class action which had been brought in Puerto Rico District Court with them as unnamed members of the class. Under Puerto Rico law, whose application § 1988 mandates, the one-year limitations period of 31 L.P.R.A. § 5298(2) was renewed when the class action lost its class status. Such renewal is comparable to the effect of savings statutes in the majority of states, as discussed by this Court in *Burnett* v. *New York City Rr. Co.*, 380 U.S. 424 (1965).

That Plaintiffs' suits were timely is supported by *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) a Clayton Act case which similarly involved the tolling effect on unnamed members of a class of the denial of class certification to a federal class action. *American Pipe* first addressed the relationship between Rule 23 and statutes of limitations in general, and held that the filing of a Rule 23 class action tolls the governing statute of limitations. This Court then went on to apply a tolling rule

of suspension to the unnamed members of the class after denial of class certification. As to the latter, however, the Court repeatedly emphasized its reliance on the Congressional Clayton Act limitations scheme with its tolling rule of suspension that was applicable to antitrust causes of action.

*American Pipe* thus did not set out a generally applicable tolling rule of suspension whenever class status is lost; instead, it insisted that the relevant limitations scheme must determine the "precise tolling effect" of loss of class status. Because § 1988 mandates that the relevant limitations and tolling law for § 1983 suits, whether brought by individuals or as class actions, is that of the forum state, in these cases Puerto Rico law governs. Thus, the Rule 23 interests considered in *American Pipe* and the federalism interests protected by § 1988 and addressed in *Tomanio* are accommodated without conflict.

But even if *American Pipe's* tolling rule of suspension for federal class suits which lose their class status is not based solely on the Clayton Act but rather is a *judicial* tolling rule of general applicability, Puerto Rico law nonetheless governs in these cases. § 1988's very language, as well as this Court's case law, requires that state tolling law be used where the "laws of the United States," meaning *federal statutory law*, are deficient. A *judicial* tolling rule thus does not qualify as a "law of the United States" and hence state law—here, Puerto Rico law—must be applied.

Alternatively, if the *American Pipe* tolling rule of suspension is a Rule 23 interpretation of general applicability, then it should be read as inapplicable to § 1983 federal class actions so as to avoid a violation of the Rules Enabling Act, 28 U.S.C. § 2072. However, if as a Rule 23 interpretation it were found applicable to § 1983 federal class actions, at least in these cases this tolling rule would

violate the Rules Enabling Act because it would abridge or modify Plaintiffs' substantive rights under Puerto Rico limitations and tolling law.

## ARGUMENT

### I. Both *American Pipe* And 42 U.S.C. § 1988 Require The Application Of State Tolling Law To Determine The "Precise Tolling Effect" Of The Denial Of Class Certification to § 1983 Federal Class Suits

#### A. *American Pipe's* Distinction Between "General Tolling" And "Precise Tolling Effect"

In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the State of Utah, on May 13, 1969, filed a Sherman Act treble damages class action against American Pipe, eleven days short of a year after a final consent judgment had been entered on May 24, 1968, against American Pipe in a civil antitrust action brought by the United States almost five years earlier. Utah's Rule 23(b)(3) class action was found timely by the District Court under the four-year limitations period for antitrust actions because Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), provided for suspension of the limitations period for private actions during the pendency of any United States antitrust proceeding and for one year following.

The District Court thereafter held on December 4, 1969, that the Utah suit could not be maintained as a class action for lack of numerosity and so ordered. Eight days later, on December 12, 1969, other members of the proposed class moved to intervene as parties. The District Court refused to allow intervention on the ground that the limitations period of Section 5(b) had already run against them. Reversing, the Court of Appeals held that suit was actually commenced by Utah on behalf of the members of the proposed class and that this rendered improper the District Court's denial of their request to intervene.

Affirming, this Court first held, after an extensive discussion of Rule 23 and statutes of limitation in general, that the commencement of Utah's Rule 23(b)(3) class action stopped the running of the statute of limitations for all unnamed members of the proposed class during the pendency of the motion to strip the action of its class character. The Court then held, applying the Clayton Act's suspension provision, that upon the class action's loss of its class character for lack of numerosity, the previously suspended limitations period continued to run. The Court concluded that because the Utah suit was filed with eleven days remaining under Section 5(b) of the Clayton Act, the intervenors had eleven days after the class decertification to move for permission to intervene. Hence, their motions were timely, and they were not time barred.[2]

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[2] Defendants attempt to interject an *American Pipe*-related issue which is neither properly before this Court nor in fact implicated in these cases. In their Brief at p. 12 n.18 and p. 30 n.14, they suggest that the *American Pipe* rule, whatever its scope, is limited to cases in which the unnamed members of the class make timely motions to intervene after the class suit is denied certification. However, Defendants never raised this issue before, and apparently became aware of it only when this Court granted certiorari in *Parker* v. *Crown, Cork and Seal Co.*, 677 F.2d 391 (4th Cir.), *cert. granted*, 51 U.S.L.W. 3352-53 (Nov. 9, 1982), on the very same day certiorari was granted in these cases. Thus, Defendants clearly waived this issue. Also, this Court granted certiorari in these cases *solely* to deal with the relationship among *American Pipe*, 42 U.S.C. § 1988 and *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980). (J.A. 162a). Finally, on the merits, the Plaintiffs in effect moved for leave to intervene after the denial of class status when the class action Plaintiff, together with other members of the previously proposed class, filed a timely motion pursuant to Rule 15 requesting leave to amend the class action complaint to include all of these named individual Plaintiffs. (J.A. 29a-48a). This motion, denied on November 21, 1978 (J.A. 53a), was followed by a motion for reconsideration, which was

**1. "General Tolling"**

This Court in *American Pipe* explicitly dealt with two different aspects of tolling. When it addressed the Rule 23 interests, it ruled on what Plaintiffs will call the "general tolling" question relating to the *filing* of a class suit, as follows:

> "We are convinced that the rule most consistent with federal class action procedure must be that *the commencement of a class action suspends the applicable statute of limitations* as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. (emphasis added)

This "rule," as applied to federal class actions in general and § 1983 federal class actions in particular, requires that upon their filing, the running of the relevant statute of limitations is stopped so long as possible class action status remains.

"General tolling" is functionally necessary for the protection of the interests of unnamed members of the proposed class regardless of whether the class continues as such or is ultimately determined not appropriate for certification. As *American Pipe* points out, this protection is provided for all unnamed members of the class who might subsequently participate in the suit. Otherwise, the only way they could assure participation in the judg-

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filed on November 29, 1978 (J.A. 54a-72a) and denied on December 11, 1978.

If this Court were to hold that *American Pipe* is inapplicable to these cases, Plaintiffs nevertheless would contend that under 42 U.S.C. § 1988, Puerto Rico law governs in these cases as to both "general tolling" and "precise tolling effect." See the analysis of Puerto Rico law at pp. 18-21 *infra*.

ment if the class suit were allowed to continue, or could preserve the timeliness of their individual claims if the class suit later lost its status, would be to file pre-limitations motions to join or intervene. This would, of course, frustrate the very purposes of Rule 23: litigative efficiency and economy. 414 U.S. at 551.

In these cases, therefore, *American Pipe* mandates that the original filing of these political discrimination cases as a § 1983 class action stopped the running of the one year Puerto Rico statute of limitations so long as class status was not lost. The First Circuit in fact applied the "general tolling" rule of *American Pipe* to these cases.[3] Similarly, when the Ninth Circuit in *Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982), asserted that "the federal rule, not the state law, governs the tolling issue relevant here . . .," *id.* at 619, the court was referring to the "general tolling" rule of *American Pipe*.

**2. "Precise Tolling Effect"**

*American Pipe* dealt in addition with what Plaintiffs call the "precise tolling effect" on unnamed class members resulting from the loss of class action status. This Court reasoned:

> "It remains to determine *the precise effect the commencement of the class action had on the rele-*

[3] It was only in connection with "general tolling" and not the "precise tolling effect" of loss of class status, discussed next, that the First Circuit stated that "there is no discernible state rule" (J.A. 135a). Because Puerto Rico class action rules are modeled on Rule 23 (J.A. 135a), the First Circuit apparently thought it necessary by reason of 42 U.S.C. § 1988 to apply *American Pipe's* "general tolling" as a matter of Puerto Rico law. This approach to *American Pipe's* "general tolling," while it led to the correct result, goes farther than required by Plaintiffs' Argument I.

> *vant limitation period.* Section 5(b) of the Clayton Act provides that the running of the statutes of limitation be '*suspended*' by the institution of a Government antitrust suit based on the same subject matter. The same concept leads to the conclusion that the commencement of the class action in this case suspended the running of the limitation period only during the pendency of the motion to strip the class of its class action character. The class suit brought by Utah *was filed with 11 days yet to run* in the period as tolled by § 5(b), *and the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene . . .*" 414 U.S. at 560-561. (emphasis added)

It is clear from *American Pipe* that once a class is stripped of its class action character, the "precise tolling effect" question is governed not by any universally applicable federal rule of suspension, but rather by the limitations scheme applicable to the particular substantive cause of action. In *American Pipe* itself, Section 5(b) of the Clayton Act provided that the "precise tolling effect" was suspension of the limitations period. This Court borrowed the Clayton Act's "precise tolling effect" and applied it to the consequences of the District Court's order "stripp[ing] the suit of its class action character." Such borrowing was consistent with this Court's sensitivity to Congressionally determined policies underlying the Clayton Act's limitations scheme. 414 U.S. at 561. It was also consistent with the Advisory Committee's Note on Proposed Rule 23, quoted in *American Pipe*, regarding the "precise tolling effect" issue resolved in *American Pipe*:

> "[T]he question 'whether the intervenors in the nonclass action shall be permitted to claim . . . the benefit of the date of the commencement of the action for purposes of the statute of limitations [is] to be de-

> cided by reference to the laws governing . . . limitations as they apply in particular contexts.' " 414 U.S. at 554 n.24.

Plaintiffs' interpretation of *American Pipe* draws considerable support from this Court's earlier decision in *Burnett* v. *New York City Rr. Co.*, 380 U.S. 424 (1965). There, a suit under the FELA, 45 U.S.C. § 51 *et. seq.*, was filed in state court shortly before the three year federal statute of limitations had run. The defendant had been served with process but the case was dismissed for improper venue. Eight days later, after the three year limitations period had expired, the FELA suit was refiled in federal court. Describing the tolling issue as one of "legislative intent," this Court said. "[T]he basic inquiry is whether Congressional purpose is effectuated by tolling the statute of limitations in given circumstances." 380 U.S. at 427.

The Court, after analyzing the purposes and statutory scheme of the FELA, went on to hold: (1) the filing of the FELA action in state court tolled the FELA three year limitations period and (2) the tolling continued until the state court's dismissal order for improper venue became final. This Court reasoned:

> "[B]oth Congress and the States have made clear, through various procedural statutes, their desire to prevent timely actions brought in courts with improper venue from being time-barred merely because the limitation period expired while the action was in the improper court." *Id.* at 434.

Several features of *Burnett* are highly significant here. First, just as *Burnett* distinguished between the tolling effect of filing the state FELA action and the effect of the state court's dismissal for improper venue, so too did *American Pipe* distinguish between the tolling effect of filing the federal class action ("general tolling") and the "precise tolling effect" of the loss of class status. These

distinctions follow from the fact that neither a state court's dismissal for improper venue nor a federal court's decision refusing to certify a class for lack of numerosity is a decision on the merits.

Second, *American Pipe* and *Burnett* both focused on Congressional intent respecting tolling for their respective federal causes of action. Thus, in *American Pipe* Congressional antitrust policy supported the federal "precise tolling effect" rule of suspension; in *Burnett* Congressional FELA policy supported a "precise tolling effect" rule based on when a state court's dismissal order becomes final under state law. Indeed, if state law governs "precise tolling effect" in a *Burnett* FELA situation where there is no explicit Congressional mandate to use state law in this way, surely state law governs where Congress expressly so indicates. As will be seen next, Congressional policy for § 1983 actions, as set out in 42 U.S.C. § 1988, requires that state tolling law govern "precise tolling effect."

In short, under *American Pipe*, the "precise tolling effect" of a § 1983 federal class action must be determined by the limitations scheme applicable to § 1983 actions and not by any universally applicable tolling rule of suspension. That limitations scheme and its attendant tolling law are, by reason of 42 U.S.C. § 1988 and *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), determined by state law. It will be demonstrated that in these cases the applicable Puerto Rico tolling law determines that the "precise tolling effect" of the denial of class certification is the *renewal* of the applicable one year Puerto Rico statute of limitations.

This approach to *American Pipe's* "precise tolling effect" as applied to § 1983 class suits stripped of their class action character was correctly adopted by the First Circuit in these cases. In contrast, the Ninth Circuit in

*Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982), dealt, as noted earlier, only with "general tolling." *Pavlak* never reached the "precise tolling effect" question implicated in class suits which lose their class status because it held for unrelated reasons that the plaintiff there could not even avail herself of the benefit of *American Pipe's* "general tolling." *Id.* at 620-21. *Pavlak* therefore is inapposite.

**B. 42 U.S.C. § 1988 And *Tomanio***

This Court has long and consistently held that in the absence of Congressional provision of a relevant federal limitations period, state statutes of limitation govern § 1983 actions. *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914). *Cf. Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). Indeed, this was and still is the general rule for most federal causes of action filled in federal courts. *Campbell* v. *City of Haverhill*, 155 U.S. 610 (1895); *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). This rule is based on the view that Congress by its silence must have intended that state limitations law apply. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). Recently, this Court explained in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), that in § 1983 cases filed in federal court the "laws of the United States" are deficient in not providing a statutory limitations period. Therefore 42 U.S.C. § 1988 requires that the limitations law of the forum state govern § 1983 actions, unless state limitations law is "inconsistent" with the federal policy underlying the § 1983 cause of action.[4]

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[4] In *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), the Court had previously found that the "laws of the United States" were similarly deficient in not providing a statutory survivorship rule. Therefore, § 1988 required that state survivorship law be applied to § 1983 suits.

Not only is a state's limitation law applicable to § 1983 actions, but so too is a state's tolling law. This Court expressly held in *Board of Regents* v. *Tomanio*, *supra*, that the forum state's tolling law is an inextricable part of its limitations scheme and therefore governs § 1983 suits brought in federal court. *Tomanio* dealt with a New York chiropractor whose request for a waiver of a chiropractor's examination was turned down by the board of regents without an evidentiary hearing on November 22, 1971. In January, 1972, plaintiff initiated state court proceedings challenging this waiver refusal as arbitrary and capricious; she did not, however, raise any constitutional challenge in the state proceedings. In November, 1975, the New York Court of Appeals affirmed an order of an intermediate appellate court which had ruled against plaintiff. Then, in June, 1976, plaintiff brought her § 1983 action in federal court alleging that the board's refusal to grant the waiver request and give her a license violated due process.

Both the District Court and Second Circuit ruled on the merits in plaintiff's favor after they rejected the defendants' argument that the applicable three-year New York statute of limitations barred plaintiff's action. While plaintiff's § 1983 claim arose in November, 1971 when the request for waiver was denied, both courts held that the three-year limitations period was tolled during the state court litigation. Her § 1983 action filed in June, 1976 was not time-barred, they found, because the tolling period ran from January, 1972 to November, 1975. In this regard both courts used a *judicially created federal tolling rule* which the Second Circuit considered justified "in the interest of advancing the goals of federalism."

This Court reversed without reaching the merits. It relied on the language of § 1988 and on its earlier deci-

sions in *Robertson* v. *Wegmann*, 436 U.S. 584 (1978) and *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), for the principle that the New York rule for tolling the three-year statute of limitations—not a judicially created federal tolling rule—must be applied. This Court reasoned as follows:

> "Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983—a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action . . . Although the Court of Appeals found that respondent's action was governed by a three-year New York statute of limitations, the court did not apply the New York rules governing the circumstances under which that statute of limitations could be tolled.
>
> *In § 1983 actions, however, a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law.* In § 1988, Congress 'quite clearly instructs' when federal law provides no rule of decision for actions brought under § 1983 . . . As we held in *Robertson* [v. *Wegmann*], by its terms, § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States.'
>
> In . . . [*Johnson* v. *Railway Express Agency* we said:]
>
> '*Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action.* Although any statute of limitations is necessarily arbitrary, *the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in*

> *favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.* In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.' " 446 U.S. at 484-86. (emphasis added) (citations omitted)

This Court then found that New York tolling law did not provide for tolling the three-year statute during the pendency of state court proceedings. It also concluded that New York tolling law was not "inconsistent" (within the meaning of § 1988) either with the § 1983 policies of deterrence and compensation, or with the general federal policies of uniformity and federalism. Thus, the *Tomanio* plaintiff's § 1983 action was time-barred.

Clearly, then, when § 1983 suits are brought by individuals in federal court, § 1988 mandates that tolling questions are answered by recourse to state law. When § 1983 class action suits are brought in federal court, *American Pipe*, properly understood, requires that the limitations scheme applicable to § 1983 actions govern the "precise tolling effect" of denial of class certification. The applicable limitations scheme, according to § 1988 and *Tomanio*, is the forum state's limitations scheme with its tolling law.

This reading of *American Pipe*, § 1988 and *Tomanio* properly accommodates the federal interests in efficiency and economy in federal class action litigation. It further ensures, both in general and as applied to these cases, the "essential fairness" to defendants provided by statutes of limitation. As was true in *American Pipe* itself, the filing

of the § 1983 class suit in these cases "notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 414 U.S. at 555. Moreover, this reading furthers the federalism interest in state value judgments regarding the proper balance between policies of repose and fairness to plaintiffs. Indeed, to a much greater extent than mere Congressional silence, *Campbell* v. *City of Haverhill*, 155 U.S. 610 (1895), § 1988 as a Congressionally enacted statute gives federal weight to such state value judgments.

Hence, Plaintiffs frankly argue that under *American Pipe* they can have it both ways: *American Pipe* mandates "general tolling" as a result of filing a proposed § 1983 class action in federal court, while *American Pipe*, § 1988 and *Tomanio* require that the forum state's law determines the "precise tolling effect" on unnamed members of the federal class of denial of class certification. This approach avoids the anomaly of applying one tolling rule to an individual § 1983 suit and another tolling rule to a § 1983 class action, where both are brought in federal court. It also assures that the same state tolling rules will apply to all § 1983 suits, whether brought in federal or state courts.

In contrast, reading *American Pipe*, as Defendants do, to require that suspension, and suspension alone, is the "precise tolling effect" in *all* federal class actions, including § 1983 class actions, would twist *American Pipe's* meaning, would undercut significant interests in federalism and, as discussed in Arguments II and III, would create conflicts with § 1988, *Tomanio* and the Rules Enabling Act, 28 U.S.C. § 2072. Such a suspension rule, moreover, would not significantly promote procedural

uniformity because it would necessarily be applied to many federal and state statutes of limitations with very different limitations periods.

In these cases, therefore, under *American Pipe* itself, Puerto Rico tolling law, applied pursuant to § 1988, determines the "precise tolling effect" of the District Court's denial of certification for Plaintiffs' proposed § 1983 class action on the ground of lack of numerosity. As discussed next, the First Circuit correctly found under Puerto Rico law that the District Court's denial of class certification renewed the one year limitation period for all members of the class.

### C. Puerto Rico Tolling Law And The Similarity To Saving Statutes

Plaintiffs at the outset emphasize Puerto Rico's weighty interests in having its tolling law of renewal apply to determine the "precise tolling effect" of the stripping of the class character of § 1983 class actions. For one thing, its tolling law, as enacted by the legislature and uniformly interpreted and applied by Puerto Rico courts, reflects Puerto Rico's balancing of the interests in universally recognized policies of repose against interests in fairness to plaintiffs. For another, all of the parties in these cases are Puerto Rican, and hence there is no unfairness, as the First Circuit properly observed, in applying to them the relevant Puerto Rico tolling law. Plaintiffs cannot understand Defendants' rather remarkable assertion that the First Circuit simply manufactured Puerto Rico tolling law in order to rule for Plaintiffs, especially since Defendants themselves conspicuously avoided analyzing any Puerto Rico law whatever in their Brief.

**1. Puerto Rico Law**

31 L.P.R.A. § 5303, which is based on the Spanish Civil Code, reads as follows:

> "Prescription of actions is interrupted *by their institution before the courts*, by extrajudicial claim of the creditor and by any act of acknowledgment of the debt by the debtor." (emphasis added)

Under section 5303, it is clear that when an individual files a lawsuit, the relevant Puerto Rico statute of limitations is interrupted, even before service of process, *Feliciano* v. *A.S.A.*, 93 P.R.R. 638 (P.R.S.Ct. 1966), and even if the suit is dismissed upon motion for nonsuit, *Parilla* v. *Loiza Sugar Co.*, 52 P.R.R. 232 (P.R.S.Ct. 1937), or for want of jurisdiction, *Diez* v. *Green*, 32 P.R.R. 749 (P.R.S.Ct. 1924). The general rule was stated by the Puerto Rico Supreme Court in *Moa* v. *Commonwealth*, 100 P.R.R. 572, 589 (P.R.S.Ct. 1972), as follows:

> "[T]he mere effective filing of a complaint before a court within the period of prescription . . . produces the interruptive effect on the extinctive prescription of the action exercised, regardless of the vicissitudes that may arise subsequent to the filing of the complaint. . . ."

Even though there was no Puerto Rico class action decision on all fours, the First Circuit properly interpreted Puerto Rico tolling law and its class action statute, P.R. Laws Ann. tit. 32, App. II, R. 20.1, in holding that the Plaintiffs could benefit from the tolling effect of the filing of the § 1983 class suit. (J.A. 133a-135a) In this respect, Puerto Rico law functions in the same way as *American Pipe's* "general tolling" rule, discussed earlier.

However, once the class was denied certification in August, 1978, the First Circuit correctly ruled (J.A. 135a-136a) that the one-year limitations period began to

run anew under Puerto Rico law. That is, under section 5303, in contrast to merely continuing the running of a previously suspended statute of limitations, a new limitations period began when the class was denied certification.[5] *Heirs of Gorbea* v. *Portilla*, 46 P.R.R. 279 (P.R.S.Ct. 1934) (the limitation period "must be counted anew"); *DeJesus* v. *DeJesus*, 37 P.R.R. 143 (P.R.S.Ct. 1927) ("[I]t becomes evident that the prescription of the action was interrupted by the mere act of filing the complaint and that interruption has for its effects that the time for the prescription must be computed anew.") *See also Feliciano* v. *A.S.A.*, 93 P.R.R. 638 (P.R.S.Ct. 1966), where the Puerto Rico Supreme Court said in connection with interruption by judicial claim:

> "[T]he new period begins to run from the time that the litigation action, the commencement of which interrupted the period, ends."

To the same effect is *Josefa Duran Cepeda* v. *Ismael Morales Lebron*, P.R.S.Ct. 1982 (Appendix 1a-8a to Plaintiffs' Brief in Opposition to Petition). Therefore, the § 1983 suits of the Plaintiffs, all of which were filed within one year of August 21, 1978 (the date of denial of class certification), were timely.

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[5] Louisiana, a French civil law jurisdiction, has a similar limitations and tolling scheme which provides for "interruption" of prescription by the timely filing of a civil suit. LSA-R.S. 9:5801. As stated in *Derbofen* v. *T. L. James & Company, Inc.*, 274 So.2d 734 (La.App. 1973): "A suit which interrupts prescription (here, the first suit) prevents prescription from running until that suit's final determination *at which time the full prescriptive period begins to run anew.*" *Id.* at 738 (emphasis added). *See also Burnett* v. *N. Y. Central R. Co.*, 380 U.S. 424, 432 n.9 (1965).

The First Circuit's interpretation and application of Puerto Rico law must be deferred to in these cases because of its expertise in Puerto Rico civil law, *Pagan Torres* v. *Negron Ramos*, 578 F.2d 11 (1st Cir. 1978), and the Spanish civil law system itself. *See Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42-43 (1970), and *Bonet* v. *Texas Co*, 308 U.S. 463, 470 n. 17 (1940). In this regard, the First Circuit was free to consider all of the data that a Puerto Rico court would use in deciding these tolling issues. *Cf. Commissioner* v. *Estate of Bosch* 387 U.S. 456, 465 (1967), and C. Wright, *Federal Courts* § 358, at 269 (3d ed. 1976).

**2. The Similarity to Saving Statutes**

Puerto Rico's renewal approach to tolling, while based on section 5303 and the Spanish Civil Code, is not unusual even in common law jurisdictions. Thus, for example, it has long been established at common law that a debtor's acknowledgment of a debt "revives" the creditor's cause of action. *Developments in the Law-Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1254-1260 (1950). Indeed, this very rule is embodied in section 5303 which provides for tolling "by any act of acknowledgment of the debt by the debtor." Puerto Rico goes beyond this application of claim renewal to include "extrajudicial claim[s] of the creditor,"[6] as well as the institution of suits "before the courts." It turns out, however, that Puerto Rico's renewal rule, when applied to suits "instituted . . . before the

[6] This part of section 5303 is not now before the Court, but was addressed by the First Circuit in these cases. (J.A. 141a-144a). That court expressed no doubt about Puerto Rico's renewal rule as applied to extrajudicial claims, but ruled that Plaintiffs protest letters did not constitute such claims.

courts," is very similar to the saving statutes found in a majority of states.[7]

Saving statutes provide generally that where a party has commenced an action which fails for some reason not related to the merits, another action on the same claim may be brought within a specific limited period following dismissal of the first action. *Burnett* v. *New York City Rr. Co.*, 380 U.S. 424, 431-32 (1965), discussed at pp. 11-12, *supra*. These situations typically involve dismissals for lack of jurisdiction or improper venue. Thirty-one states have adopted such saving statutes while fourteen others have somewhat different statutes which provide that upon reversal on appeal of a judgment for plaintiff or on arrest of judgment for plaintiff where the action was timely commenced, the plaintiff has additional time to start a new action *Id.* at 431-32 n. 9; W. Ferguson, *The Statutes of Limitation Saving Statutes* 2 (1978). It is also significant, given Puerto Rico's renewal of its one-year limitations period in these cases, that twenty-one states with saving statutes provide a period of one year in which to start a new action. W. Ferguson, *supra* at 379. Six states use a six-month period, while one uses a five-year period. *Id.* Only one state suspends the limitations period during the pendency of the first suit, in certain situations, while using six-month or one-year periods in others. Va. Code 1950 § 8.01-229.

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[7] *See also* this Court's observation in *Burnett* v. *New York City Rr. Co.*, 380 U.S. 424, 434 (1965):

> "[B]oth Congress and the States have made clear, through various procedural statutes, their desire to prevent timely actions brought in courts with improper venue from being time-barred merely because the limitation period expired while the action was in the improper court."

Consequently, from the perspective of this national survey, Puerto Rico's section 5303 renewal rule for actions instituted before the courts, as interpreted and applied by the Puerto Rico Supreme Court and the First Circuit in these cases, is not at all aberrational. It is *American Pipe's* suspension rule, based on the Clayton Act, which is unusual.[8] This illuminates what Plaintiffs argue in these cases: the denial of class certification for lack of numerosity is comparable to the dismissal of a suit for lack of jurisdiction or improper venue. Through § 1988, that denial brought into play Puerto Rico's equivalent of a saving statute which renewed the relevant one-year limitations period.

Plaintiffs observe, finally, that there has never been any claim by Defendants that the foregoing Puerto Rico tolling law is "inconsistent" with the compensation and deterrence purposes of § 1983. Such a claim would be unpersuasive in these cases because applying Puerto Rico tolling law to the Plaintiffs *vindicates* their § 1983 claims. There is also no inconsistency with any policies of repose applicable to these Puerto Rico Defendants, as the First Circuit found (J.A. 136a). And surely there is none with federalism policies where it is Puerto Rico law that is to be applied. Moreover, even if it had turned out that Puerto Rico tolling law were considerably more pro-plaintiff than the tolling law of other jurisitions, there would still have been no such inconsistency. This Court in *Robertson* v. *Wegmann*, 436 U.S. 584, 591-92 (1978) suggested that while Louisiana survivorship law was in cer-

[8] The Clayton Act did not contain a saving provision of the kind described above. Nor was there a generally applicable federal saving statute.

tain ways more pro-plaintiff than most, it would nevertheless be applied pursuant to § 1988 in appropriate § 1983 cases filed in federal court.

### II. Despite *American Pipe's* Judicial Tolling Rule, 42 U.S.C. § 1988, As Interpreted In *Tomanio*, Mandates That State Tolling Law Apply To § 1983 Federal Class Actions Denied Certification

Even if this Court does not accept Plaintiffs' proposed mutual accommodation of *American Pipe* and § 1988 as set out in Argument I, there are other compelling reasons why state tolling law must govern the "precise tolling effect" of stripping § 1983 federal class actions of their class character. The *American Pipe* rule, insofar as Defendants argue that it universally requires suspension where class actions are denied certification, is a *judicial tolling rule*.[9] As such, as will be shown, it is inapplicable in § 1983 federal class actions by reason of § 1988's mandate to apply state tolling law when the "laws of the United States," meaning only federal *statutes*, are deficient. Consequently, while the *American Pipe* suspension rule may well apply to most federal class actions upon loss of their class status, and is admittedly not limited to anti-trust class actions, it does not apply to § 1983[10] class actions brought in federal court which are denied class

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[9] Plaintiffs focus here on the "precise tolling effect" part of *American Pipe* and not on "general tolling" relating to the filing of a class action. The latter, whether governed in § 1983 federal class suits by *American Pipe* or by § 1988 and *Tomanio*, leads to the same result in Puerto Rico. *See* the discussion of Puerto Rico law at pp. 18-21, *supra*, and the First Circuit's opinion (J.A. 134a-135a).

[10] Or to federal class actions brought under §§ 1981, 1982, 1985(3) or any other federal civil rights statute covered by § 1988.

certification. Instead the forum state's tolling law applies; in these cases the relevant tolling law is Puerto Rico's renewal rule.

### A. The *American Pipe* Rule Is A Judicial Tolling Rule

Federal courts have long possessed "judicial power to toll statutes of limitation in federal courts," as recognized in *American Pipe* itself. 414 U.S. at 558. Plaintiffs submit that the *American Pipe* rule, which only suspends upon loss of class status, is an application of this judicial power, and is not an interpretation of Rule 23. This characterization of the *American Pipe* rule is supported by the language of Rule 23 which says nothing on its face about tolling. It is also supported by the Advisory Committee's Note on Proposed Rule 23 which, as quoted in *American Pipe*, states in relevant part that the tolling issue relating to the loss of class status is "to be decided by reference to the laws governing . . . limitations as they apply in particular contexts." 414 U.S. at 554 n. 24. Moreover, throughout this Court's opinion in *American Pipe* there are references to "the tolling rule *we* establish here"; "recognizing *judicial power* to toll statutes of limitation in federal courts . . . [is] not breaking new ground"; and "[o]ur conclusion that a *judicial tolling* of the statute of limitations. . . ." *Id* at 555, 558, and 558 n.29, respectively. (emphasis added)

### B. The "laws of the United States," Within The Meaning Of 42 U.S.C. § 1988, Are Silent Regarding Tolling In § 1983 Federal Class Actions

The *American Pipe* judicial tolling rule of suspension does not apply to § 1983 class actions denied certification. § 1988 requires a court to look first to whether any relevant federal *statutory* law exists. In *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980) and *Robertson* v. *Weg-*

*mann*, 436 U.S. 584 (1978), the lower federal courts, in ruling for the plaintiffs, had established *judicial* tolling and survivorship rules. However, this Court nevertheless held, in reliance on § 1988, that *state* tolling and survivorship rules govern § 1983 actions. Therefore, when this Court spoke in *Tomanio* of the fact that "federal law provides no rule of decision for actions brought under § 1983," 446 U.S. at 484, it must have meant federal *statutory* law and *not* federal decisional law, for there was already a judicially created tolling rule in *Tomanio* and a judicially created survivorship rule in *Robertson*.

That § 1988 requires federal *statutory* law to be looked to is evident from § 1988's language. § 1988 speaks of the "laws of the United States," which must be applied unless they are "deficient," then almost immediately thereafter refers in contrast to "the common law," as modified by a state's constitution and statutes. Inasmuch as "common law" is decisional, the clear implication of § 1988's "laws of the United States" is that the phrase covers only federal statutory law. Further, § 1988 may be viewed as analogous [11] to the Rules of Decision Act, 28 U.S.C. § 1652, as interpreted by *Erie* v. *Tompkins*, 304 U.S. 64 (1938). § 1988 requires the use of state substantive statutory and decisional law in certain civil rights cases while the Rules of Decision Act does the same in diversity cases. Inasmuch as state law governs diversity cases under the Rules of Decision Act "except where the Constitution or treaties of the United States or *Acts of Congress* otherwise require or provide" (emphasis added), § 1988's "laws of the United States" should be interpreted similarly as referring only to federal statutory law.

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[11] This analogy is relied on in Defendants' Brief at p. 17.

This interpretation of § 1988 makes sense for yet another reason. As *Tomanio*, *Robertson* and even *American Pipe* show, a federal common law of tolling and survivorship can be developed rather readily. If the phrase "laws of the United States" is understood to include federal decisional law, § 1988 would be rendered virtually meaningless. For these reasons this Court in *Tomanio* and *Robertson* correctly interpreted § 1988's "laws of the United States" to refer only to federal *statutory* law.

This crucial distinction for § 1988 purposes between federal statutory law and federal decisional law is made even clearer by comparing this Court's decisions in *Carlson* v. *Green*, 446 U.S. 14 (1980) and *Robertson*. In *Carlson*, decided *after Robertson*, this Court applied a uniform judge-made federal rule of survivorship to a *Bivens* action against federal officials. *Carlson* distinguished *Robertson*, which had rejected such a judge made survivorship rule for 1983 actions. This Court emphasized that § 1983 actions are different from *Bivens* actions because § 1988 requires that a forum state's survivorship law apply to § 1983 actions.

Because the *American Pipe* suspension rule for class actions denied certification is a judicial tolling rule and not a creation of federal statute, the cases relied on by Defendants at pp. 17-18 and pp. 23-24 of their Brief do not help them. *Bomar* v. *Keyes*, 162 F.2d 136 (2nd Cir.), *cert denied*, 332 U.S. 825 (1947), a § 1983 case, did not even discuss the § 1988 issue of concern this case. But even if it had done so and reached the same conclusion, *Bomar* would still have been readily distinguishable on the ground that there, Rule 3 of the Federal Rules of Civil Procedure explicitly answered the question of when an action is "commenced" for tolling purposes. Indeed, this

very reasoning—that Rule 3 constitutes federal statutory law—was in fact used in *Cohen* v. *Board of Education of East Ramapo Central School District*, 536 F. Supp. 486 (S.D.N.Y. 1982), also a § 1983 case, which held, following *Bomar*, that the particular federal statutory law was thus not deficient within the meaning of § 1988.

Similarly, *Hanna* v. *Plumer*, 380 U.S. 460 (1965) and *Sibbach* v. *Wilson*, 312 U.S. 1 (1941), are distinguishable in that they are diversity cases in which the relevant provisions of the Federal Rules of Civil Procedure were held to govern. *Byrd* v. *Blue Ridge Rural Electric Co.*, 356 U.S. 525, 537 (1958), also a diversity case, dealt with the "influence . . . of the Seventh Amendment" on the assignment of "disputed questions of fact to the jury." In contrast, in our cases the *American Pipe* suspension rule for class suits denied class certification is not as such an interpretation of Rule 23[12] but is rather, for the reasons suggested, a judicial tolling rule which cannot apply to § 1983 class suits because of § 1988.

Defendants' characterization of various accrual decisions of this Court and other federal courts as embodying "federal procedural principles" is simply wrong. These cases, which involved the question of when different federal causes of action accrue, dealt instead with this issue of federal substantive law: when does a federally created statutory cause of action come into existence? Thus, in *Rawlings* v. *Ray*, 312 U.S. 96, 99 (1941), this Court held that the question of "when there [is] a complete and present [federal] cause of action . . . is a federal

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[12] Plaintiffs in Argument III deal with the implications of treating the *American Pipe* suspension rule for class actions denied certification as a Rule 23 interpretation.

question and turns upon . . . the applicable federal legislation." This Court's answers to these accrual questions are always matters of federal, not state, law and therefore are binding not only where such federal statutory causes of action are brought in federal courts but also, by reason of the Supremacy clause, where such actions are brought in state courts.

Consequently, whenever § 1983 class actions are brought in federal court, state law, pursuant to § 1988, and *not American Pipe's* judicial tolling rule, determines the tolling effect of loss of class status. In these cases, the applicable tolling law is that of Puerto Rico which, as discussed earlier, renewed the Puerto Rico one year limitations period.

### III. Even If *American Pipe's* Tolling Rule Of Suspension Is A Rule 23 Interpretation, It Does Not Apply When § 1983 Federal Class Actions Are Denied Class Certification

Even if this Court's *American Pipe* holding respecting the "precise tolling effect" of stripping a Rule 23 class action of its class character constitutes an interpretation of Rule 23[13] and is not a judicial tolling rule, § 1988 nevertheless requires that the forum state's tolling law govern § 1983 class actions. Rule 23 and § 1988 should be interpreted so as to minimize conflict between them. More important, such an interpretation will avoid a violation of the Rules Enabling Act, 28 U.S.C. § 2072, by Rule 23. Indeed, this Court avoided a comparable violation in *Wal-*

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[13] Here, as in Argument II, Plaintiffs deal only with the "precise tolling effect" of denial of class certification, and not with *American Pipe's* "general tolling." Whether *American Pipe* or § 1988 governs the latter in § 1983 federal class suits, the result is the same under Puerto Rico law. *See* note 9, *supra*.

*ker* v. *Armco Steel Corporation*, 446 U.S. 740 (1980), discussed later. Thus, *American Pipe's* interpretation of Rule 23 should not cover § 1983 federal class actions stripped of their class character. These should instead be governed by § 1988's mandate to use state tolling law.

If Rule 23 is understood in light of *American Pipe* as requiring the applicability of a federal tolling rule of suspension even to § 1983 federal class actions stripped of their class character, then *as applied to these cases* Rule 23 abridges or modifies substantive rights under Puerto Rico law in violation of the Rules Enabling Act, 28 U.S.C. § 2072.

### A. In Order To Avoid A Violation Of The Rules Enabling Act, *American Pipe's* Tolling Rule Of Suspension Should Be Interpreted As Not Governing § 1983 Federal Class Actions Denied Class Certification

Even if *American Pipe* construes Rule 23 as setting out a tolling rule of suspension for class actions stripped of their class character, Rule 23 should not be interpreted in this respect as applicable to § 1983 federal class actions which lose their class status. This interpretation is sound because nowhere in this Court's decision in *American Pipe* is § 1988 even mentioned. Rather, *American Pipe* dealt with the Clayton Act's statute of limitations and with the Clayton Act's statutory tolling provision. More generally, as mentioned earlier, the Advisory Committee's Note on Proposed Rule 23 indicates that different limitations schemes may lead to different tolling results in different class action cases.[14]

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[14] See pp. 10-11, *supra*.

Additionally, as argued later, interpreting *American Pipe* as imposing a tolling rule of suspension on *all* federal class suits which lose their class character, including § 1983 class suits, would create a conflict in these cases between Rule 23 and the Rules Enabling Act, 28 U.S.C. § 2072. However, this conflict may be avoided by limiting the scope of *American Pipe's* reading of Rule 23 (insofar as it deals with the tolling effect of denial of class certification) to federal class actions *except for those governed by § 1988.*

This Court similarly avoided a troublesome Rules Enabling Act issue in *Walker* v. *Armco Steel Corporation*, 446 U.S. 740 (1980). *Walker* involved the question of whether, in a diversity action, a federal court should follow state law or Rule 3 of the Federal Rules of Civil Procedure on the issue of when an action is commenced for the purpose of tolling a state statute of limitations. This Court first acknowledged that the relevant Oklahoma statute represented "a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations." *Id* at 751. It next stated that Rule 3, in contrast, "does not replace such policy determinations found in state law." *Id* at 752. The Court then held that because there was no conflict between Rule 3 and Oklahoma limitations law, Oklahoma law governed. There was accordingly no need to apply the Rules Enabling Act analysis set out in *Hanna* v. *Plumer*, 380 U.S. 460 (1965).

There is therefore no need in these cases to reach the Rules Enabling Act issue discussed next. This does not mean that Rule 23 is thereby to be artificially and narrowly construed, but only that it is to be given its "plain meaning." *Walker*, 446 U.S. at 750 n. 9. The plain meaning of Rule 23 is that it was not intended to displace state

tolling law respecting the "precise tolling effect" of denial of class certification to a § 1983 federal class suit. The existence of § 1988, the Advisory Committee's comments to the same effect,[15] and the absence of any clear indications to the contrary in *American Pipe* itself, all support Plaintiffs' contention that a Rule 23 tolling rule of suspension is not applicable to class actions governed by § 1988, including the § 1983 class suit originally filed in these cases.

### B. If Rule 23 Requires The Application Of A Tolling Rule Of Suspension To § 1983 Federal Class Actions Denied Class Certification, Then As Applied To These Cases Rule 23 Abridges Or Modifies Plaintiffs' Substantive Rights Under Puerto Rico Law And Thereby Violates The Rules Enabling Act

After *Hanna* v. *Plumer*, 380 U.S. 460 (1965), the Rules Enabling Act, 28 U.S.C. § 2072, is the touchstone for the validity of individual rules of the Federal Rules of Civil Procedure. The Rules Enabling Act provides in relevant part that such rules, in order to be valid, must not "abridge, enlarge or modify any substantive right. . . ." While Plaintiffs recognize that no Federal Rule has ever been held invalid by this Court on this basis, they submit that if Rule 23 requires that a federal tolling rule of suspension must be applied to the § 1983 suits in these cases, Rule 23 abridges or modifies substantive rights under Puerto Rico law.

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[15] It is especially telling that this Court in *Walker* read the Advisory Committee's Note on Rule 3 as only *predicting* that a *Walker*-type issue could arise, and *not* that Rule 3 was *intended* to deal with that issue. 446 U.S. at 750 n.10. Given the Advisory Committee's Note on Rule 23 and tolling, Plaintiffs contend that the same interpretation must be given to Rule 23 so as to avoid a conflict between Rule 23 and the Rules Enabling Act.

In *American Pipe*, this Court, dealing with a comparable Rules Enabling Act issue in a federal antitrust setting, observed: "[T]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." 414 U.S. at 557-58. When it applied this approach in the *American Pipe* case itself, the Court relied on its understanding of the antitrust acts and on their legislative history for its conclusion that tolling the Clayton Act limitations period did not abridge or modify a substantive right.

In contrast, in *Walker* v. *Armco Steel Corporation*, 446 U.S. 740 (1980), this Court concluded that the Oklahoma statute was "*a statement of substantive decision* by that State that actual service on, and accordingly, actual notice by, the defendant is *an integral part of the several policies served by the [Oklahoma] statute of limitations.*" *Id* at 751. (emphasis added). As discussed earlier, *Walker* ultimately turned out not to involve a conflict between Rule 3 and the Oklahoma statute. However, the significant feature of *Walker* for present purposes is its inquiry into Oklahoma law, both statutory and decisional, as support for its determination that Oklahoma's "service rule must be considered part and parcel of the statute of limitations." *Id* at 752.

Similarly, Puerto Rico's section 5303 tolling rule of renewal is "part and parcel" of its statute of limitations scheme. This limitations scheme with its one-year statute of limitations applies by reason of § 1988 both to the § 1983 class suit originally filed here and to the Plaintiffs' individual § 1983 suits. Because section 5303's renewal rule is substantive, as discussed next, the tolling rule of suspension of *American Pipe* and Rule 23 cannot validly apply to the § 1983 suits of these Plaintiffs under the Rules Enabling Act.

The earlier discussion of Puerto Rico tolling law with emphasis on the importance of its Spanish Civil Code basis, demonstrated the close relationship between Puerto Rico's limitations scheme and its section 5303 tolling rule of renewal. That is, regardless of whether there is a lawsuit, an extrajudicial claim or an acknowledgment of a debt by a debtor, the limitations renewal rule is universally applicable. *Josefa Duran Cepeda* v. *Ismael Morales Lebron* (P.R.S.Ct. 1982) (Appendix 1a-8a to Plaintiffs' Brief in Opposition to Petition).

Even more significant is the Puerto Rico Supreme Court's decision in *Manuel Febo Ortega* v. *Superior Court of Puerto Rico* (P.R.S.Ct. 1974) (Appendix 24a-27a to Plaintiffs' Brief in Opposition to Petition). Dealing with the question whether a compulsory counterclaim filed by a defendant is time-barred where the plaintiff's previously filed claim is timely, the Puerto Rico Supreme Court asserted:

> "The distinction between the substantive and the procedural is often faint and blurred, *but not in this case*. What is to be decided here is how and in whose behalf the statute of limitations may be interrupted, *having in mind that the limitation of actions is not a procedural, but a substantive matter, with which our Civil Code specifically deals in arts. 1840-1874, 31 L.P.R.A. §§ 5261-5304*." (Id. at 25a). (emphasis added)

Ultimately ruling that the defendant's counterclaim was not time-barred, the Puerto Rico Supreme Court characterized the "true foundation" of statutes of limitations as a presumption of abandonment or relinquishment on the part of the plaintiff which furthers the "purposes of social need and utility, which require that suits must be instituted within the specified terms."

Puerto Rico statutes and case law thus show that Puerto Rico's limitations and tolling scheme is not solely designed with the procedural end of making "the process of litigation a fair and efficient mechanism for the resolution of disputes." Ely, *the Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724 (1979). Puerto Rico's scheme does more. In certain circumstances, as where the limitations period has run without tolling, it protects the state of mind of the potential defendant. In other circumstances, as where the limitations period has been tolled and thereby renewed, it protects the state of mind of the actual or potential plaintiff. Further, in this later tolling situation Puerto Rico has emphatically declared that it is *not* "unfair to require the defendant to attempt to piece together his defense to an old claim" or to deny such a defendant "peace of mind." *Cf. Walker* v. *Armco Steel Corporation*, 446 U.S. at 751.

These policies promoted by Puerto Rico's limitations and tolling scheme thus indicate that Puerto Rico has conferred substantive rights[16] upon the Plaintiffs within the meaning of the Rule Enabling Act. Therefore, Rule 23's tolling rule of suspension cannot validly be applied to their § 1983 suits.

## CONCLUSION

These § 1983 political discrimination cases provide a vehicle by which this Court can reaffirm the important federalism interests protected by § 1988 and at the same

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[16] The Puerto Rico Supreme Court recently reaffirmed the substantive nature of its limitations and tolling law when it stated: "We have decided that 'prescription' is a substantive and not a procedural matter, governed by the principles which given form to civil law." *Andres Olmo* v. *Young and Rubicam of Puerto Rico*, No. R-80-215 (P.R.S.Ct., 1981) (citing *Manuel Febo Ortega*).

time vindicate the significant First Amendment rights which the Puerto Rico federal jury found had been violated by these Defendants. Thus, this Court is not here faced, as it was in *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), *Robertson* v. *Wegmann*, 436 U.S. 584 (1978) and *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), with the need to choose between protecting § 1988 federalism interests on the one hand and vindicating § 1983 policies on the other.

Plaintiffs ask this Court to rule that Puerto Rico tolling law was properly applied to these § 1983 suits and thus to affirm the judgment entered by the First Circuit Court of Appeals.[17]

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[17] If this Court does not so rule, then Plaintiffs request a remand to the First Circuit Court of Appeals to determine which of the § 1983 claims of these thirty-six Plaintiffs are not time-barred even if *American Pipe's* tolling rule of suspension is applicable to them.

As indicated in the Addendum to Defendants' Brief in the First Circuit, several of the Plaintiffs had a considerable amount of time left to their limitations period as of June 19, 1978, the date on which the § 1983 class suit was filed. Two had twenty-two days, one had forty-two, one had fifty and one had one hundred-thirty eight days. It will be recalled from the Counter Statement of the Case that after the District Court's denial of class certification on August 21, 1978, there was a motion for reconsideration which was denied on September 29, 1978; there was next a motion for leave to file an Amended Complaint joining all of the Plaintiffs, which was denied on November 24, 1978; and there was finally a motion for reconsideration which was denied on December 11, 1978. Consequently, *American Pipe's* tolling of the Puerto Rico one-year limitations period continued until this last date when the District Court's decision not to allow the Plaintiffs to participate in the original § 1983 class suit became final. *Cf. Burnett* v. *New York City Rr. Co.*, 380 U.S. 424 (1965), discussed in this Brief at pp. 11-12.

Plaintiffs request such a remand for another reason: to consider the applicability of Puerto Rico tolling law to Plaintiffs' pendent Puerto Rico claims which were submitted to the jury. *See* Counter Statement of the Case.

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No. 82-271

IN THE
# Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

**On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-271

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CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

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**On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

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## REPLY BRIEF OF PETITIONERS

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Pursuant to Rule 35.3 of this Court's Rules, petitioners submit this Reply to the Brief of Respondents.

The central issue in this case is whether this Court's decision in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), applies to and controls statute of limitations tolling questions in purported class actions brought in federal court seeking relief under 42 U.S.C. § 1983. A number of lower federal courts have held that it does; only one court, the court below in this case, has held that it does not: "[I]n a § 1983 case, the federal rule and underlying reasoning of *American Pipe*, are not generally applicable." J.A. 134a. This erroneous holding should be reversed.

### I. The Rule Of *American Pipe* Is Clear.

Critical to a determination of the applicability of the rule of *American Pipe* is an understanding of the basis, rationale and operation of the rule. Petitioners believe that the rule is clear:

The filing of a purported class action in federal court suspends the running of the applicable statute of limitations as to all asserted members of the class until a decision is reached whether to certify the class; after denial of class certification, the statute resumes running as to the previously asserted members of the class and they have whatever time remained to them in the limitations period when the purported class suit was filed within which to move for permission to intervene, or possibly to file a separate law suit. 414 U.S. at 553-54, 560-61.

In their opening brief, petitioners explained the basis, rationale and operation of the rule, Pet. Br. at 10-16, and pointed out that, even though the court below refused to apply the rule, it shared petitioners' understanding of it. Pet. Br. at 12; J.A. 131a-132a. Respondents, however, now suggest that the rule of *American Pipe* actually consists of two rules: (1) a generally applicable rule limited to the tolling effect of the *commencement* of a purported class action as to asserted members of the purported class—"general tolling"; and (2) a separate rule under which the effect of the *denial* of class certification is to be determined by "the limitations scheme applicable to the particular substantive cause of action"—"precise tolling effect." Resp. Br. at 10.

This novel construction of *American Pipe* is advanced by respondents as an essential underpinning for their contention that they can, as they put it, "have it both ways," that is, (1) under "general tolling," take advantage of the federal rule of *American Pipe* only to the extent that it holds that commencement of the class action tolls the running of the statute of limitations as to them, as asserted members of the class; and then (2) under "precise tolling effect," take advantage of Puerto Rico's allegedly applicable "running anew" rule, so as to render their suits timely filed. Resp. Br. at 17.

There is, however, no basis whatsoever for the notion that *American Pipe* established such a two-step tolling rule. Indeed, respondents' so-called "precise tolling effect" concept is drawn only from their misreading of the conclusion of the

*American Pipe* opinion, where the Court began by saying: "It remains to determine the precise effect the commencement of the class action had on the relevant limitation period." 414 U.S. at 560-61. All the Court was doing in this concluding paragraph was reiterating its decision reached six pages earlier that the filing of the class action suspended the running of the statute of limitations,[1] then looking to see how long that suspension lasted, and then determining whether there was sufficient time remaining in the statutory period after it resumed running to render the intervention motions timely.

While the Court did see a parallel between its holding and the suspension effect given the initiation of a Government antitrust suit on the statute of limitations applicable to private antitrust plaintiffs under Section 5(b) of the Clayton Act, that fact in no way supports the notion advanced by respondents that the suspension rule of *American Pipe* results from a construction of Section 5(b) of the Clayton Act—as the "limitations scheme applicable to the particular substantive cause of action." Resp. Br. at 10. As noted by the Court of Appeals in *Pavlak* v. *Church*, 681 F.2d 617, 619 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3320 (U.S. October 12, 1982) (No. 82-650):

> "Although *American Pipe* concerned a cause of action under the federal antitrust laws, this was in our view an accidental feature of the case; the rule of tolling adopted there was an equitable incident of federal procedure."

Respondents seek to bolster their "precise tolling effect" theory by saying that it "draws considerable support from this Court's earlier decision in" *Burnett* v. *New York Central R.R.*, 380 U.S. 424 (1965). Resp. Br. at 11. *Burnett*, however, in-

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[1] "We are convinced that the rule most consistent with federal class action procedure must be that the *commencement of a class action suspends the applicable statute of limitations* as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554 (emphasis added; footnote omitted).

volved a federal statute of limitations applicable to a federal cause of action under the Federal Employers Liability Act ("FELA"). There, the Court determined to exercise its judicial power to toll the running of the statute of limitations where the plaintiff timely filed suit in state court, the case was dismissed for improper venue, but plaintiff promptly refiled suit in federal court. The Court held that such tolling was consistent with the Congressional intent underlying FELA, and found that this result was analogous to its earlier ruling in *Herb* v. *Pitcairn*, 325 U.S. 77 (1945), where the Court had held that, if a state FELA action with improper venue was transferred to another state court with proper venue (*i.e.*, rather than being dismissed and refiled), such a transfer after the statute of limitations had run would not render the action untimely. The Court in *Burnett*, for federal policy reasons, adopted this federal tolling rule for uniform application, and expressly declined to incorporate into the federal scheme a state savings statute that would have led to a similar result. 380 U.S. at 433-34. To this extent, if *Burnett* is at all relevant to the instant case, it supports petitioners, since it involves application of a uniform federal rule of tolling, rather than state law, to resolve a tolling issue in a federal action.

### II. Application Of The Federal Rule Of *American Pipe* Is Required In This Case.

Respondents argue that 42 U.S.C. § 1988, as construed by this Court in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), requires the application of Puerto Rico law, not the federal rule of *American Pipe*, to determine the tolling issue involved here. Resp. Br. at 13-18. That argument lacks merit.

Although the *Tomanio* Court found that, under the circumstances there involved, Section 1988 required the application of state law, in the instant case application of the federal rule of *American Pipe* is required "to insure effectuation of the purposes of litigative efficiency and economy" that Rule 23 is designed to serve. 414 U.S. at 556. *See*, Pet. Br. 13-19. As such, the federal rule of *American Pipe* should apply uniformly

throughout the federal courts, and analysis of 42 U.S.C. § 1988 should be unnecessary. Yet, even if such analysis is made, it is clear that the federal rule of *American Pipe* controls.

As this Court stated in *Tomanio*: "*In 42 U.S.C. § 1988, Congress 'quite clearly instructs [federal courts] to refer to state statutes' when federal law provides no rule of decision* for actions brought under § 1983." 446 U.S. at 484 (emphasis added; footnote and citations omitted). The federal rule of *American Pipe* provides the "rule of decision" to be applied in this case, and thus it is unnecessary to resort to Puerto Rico law.

It is clear that a judicial interpretation of a Federal Rule of Civil Procedure may constitute a "rule of decision" for purposes of § 1988. For instance, in *Bomar* v. *Keyes*, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947), cited in petitioners' opening brief at p. 17, the Court of Appeals held in a Section 1983 case that the applicable state statute of limitations was tolled by the filing of the plaintiff's complaint in federal court. The court reached that conclusion based on its interpretation of Rule 3, Fed. R. Civ. P.[2] In doing so it established a federal procedural rule of tolling. That rule has been acknowledged and implicitly approved by this Court. *Cf. Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 751 n. 11 (1980); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949). Moreover, it was recently applied in a Section 1983 action as a federal rule precluding resort to state law under Section 1988 and *Tomanio*. *See Cohen* v. *Board of Education of East Rama-*

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[2] Respondents attempt to distinguish *Bomar* from the instant case on the ground that, while Rule 23 says nothing on its face about tolling, "Rule 3 of the Federal Rules of Civil Procedure explicitly answer[s] the question of when an action is 'commenced' for tolling purposes." Resp. Br. at 27. Rule 3 itself refutes that argument, as it provides in its entirety as follows: "A civil action is commenced by filing a complaint with the court." Clearly, Rule 3 does not address, on its face, the question of what effect "commencement" has on the running of the applicable statute of limitations.

*po Central School District*, 536 F. Supp. 486, 495 (S.D.N.Y. 1982), discussed in petitioners' brief at pp. 23-24.

Thus, respondents' argument—that only federal statutes can constitute "rules of decision provided by federal law" for purposes of Section 1988 and *Tomanio*—is plainly wrong.[3] Similarly, respondents' argument finds no support in this Court's refusal to apply the *ad hoc* federal common law rules developed by the lower federal courts in *Tomanio* and *Robertson* v. *Wegmann*, 436 U.S. 584 (1978). Resp. Br. at 26, 27. Obviously there is a substantial difference between those cases, where this Court rejected the use of "federal rules" invented *in those very cases* to preserve the plaintiff's causes of

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[3] In addition, a decision of this Court construing Section 1988 strongly suggests that federal decisional law may constitute a federal "rule of decision" under that provision. In *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), this Court rejected petitioners' attempt to hold the respondent County vicariously liable under 42 U.S.C. §§ 1983, 1988 for the acts of its officials in contravention of petitioners' constitutional rights. Petitioners conceded that the County's liability under Section 1983 was foreclosed by this Court's decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), *overruled*, *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978), that a state's political subdivisions were immune from civil liability under Section 1983. On this basis, petitioners concluded that Section 1983 was "deficient in the provisions necessary to furnish suitable remedies," 411 U.S. at 700, thus justifying the utilization, under the provisions of Section 1988, of California law, under which the County could be held vicariously liable. The Court held, *inter alia*, that the use of this California law would be inconsistent with its decision in *Monroe* v. *Pape* "that Congress did not intend to render municipal corporations liable to federal civil rights claims under § 1983." 411 U.S. at 706 (citations omitted). Clearly, if the Court's decision in *Monroe* v. *Pape* could be considered a "law of the United States" for purposes of an "inconsistency" determination under Section 1988, then another decision of this Court, *American Pipe*, can constitute a federal "rule of decision" under Section 1988 which precludes the need to look to or apply Puerto Rico law in the instant case.

action, and the instant case, where petitioners rely on a pre-existing uniform federal procedural rule, established by this Court as necessary to the proper functioning of Rule 23 of the Federal Rules of Civil Procedure.[4]

### III. Important Federal Policies Dictate Application Of The Rule Of *American Pipe* In This Case.

Petitioners demonstrated in their opening brief that application of the federal procedural rule of tolling established in *American Pipe* is entirely consistent with the important federal policies relevant to this case—uniformity, federalism, and

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[4] In arguing against application of the rule of *American Pipe* on the ground that it is merely federal decisional law not within the meaning of "federal law" in Section 1988, respondents also invoke, by analogy, the Rules of Decision Act, 28 U.S.C. § 1652. Resp. Br. at 26. They assert that "federal law" within the meaning of Section 1988 should be defined consistently with the terms of the Act, which do not, on their face, include federal decisional law.

The longstanding decision of the Court of Appeals in *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961), casts considerable doubt on the correctness of respondents' analogy, at least in cases involving federal causes of action. In *Moviecolor*, a federal antitrust action governed by a state statute of limitations, the Court of Appeals found that in proper factual circumstances, the federal tolling doctrine of fraudulent concealment could toll the running of the state limitations period, despite a contrary state law rule. Rejecting an argument for a contrary result based on the Rules of Decision Act, Judge Friendly stated:

> "No distortion of language is required to read § 1652 as meaning that *state rules refusing to suspend the running of a period of limitations need not be followed in any action to enforce a federally created right*, whether on the ground that the Act of Congress establishing the right impliedly 'otherwise require[s] or provide[s],' exactly as when Congress has established its own period of limitation, or *on the ground that state rules do not 'apply' in actions to enforce federally created rights as against an established contrary federal decisional rule.*" 288 F.2d at 86 (emphasis added).

repose. Pet. Br. at 24-32. Respondents have utterly failed to refute these arguments.

Respondents make no attempt to address the concerns for judicial economy and efficiency that underlie Rule 23, Fed. R. Civ. P. Those concerns are the same in every federal class action, and thus Rule 23, as interpreted in *American Pipe*, should be applied uniformly, regardless of the subject matter of the cause of action or the source of the applicable statute of limitations. Respondents' only comment on the policy of uniformity is the feeble assertion that, "[the *American Pipe*] suspension rule . . . would not significantly promote procedural uniformity because it would necessarily be applied to many federal and state statutes of limitations with very different limitations periods." Resp. Br. at 17-18. This argument clearly misses the point. The issue here is not whether periods of limitation are to be uniform in all cases, but whether there is to be uniformity in the effect the commencement of a class action brought in federal court has on the running of the applicable statute of limitations.

Respondents also suggest that the procedural uniformity urged by petitioners would lead to non-uniformity in other areas. Specifically, they claim that application of the *American Pipe* rule to Section 1983 class actions would result in the "anomaly of applying one tolling rule to an individual § 1983 suit and another tolling rule to a § 1983 class action, where both are brought in federal court." Resp. Br. at 17. This argument makes no sense. Even if there were some difference, it would exist because of the obvious and basic differences between individual actions and class actions.[5] Yet, the fact is that there

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[5] This Court, in a different context, noted that "[t]here are special rules relating to class actions and, to that extent, they are a special kind of litigation." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 470 (1978). Indeed, the very procedural concerns prompting adoption of the *American Pipe* rule—*i.e.*, the filing of a multiplicity of individual pleadings or protective motions thus frustrating the objectives of

is no anomaly. The person who brought the class suit initially would have the benefit of his own filing date for statute of limitations and tolling purposes. If the class is not certified, the asserted non-party "members" are, through "legal fiction," carried back in time to that filing date so that the statute will not have run against them. They can then intervene in the original suit or, as some courts have held, file their own individual suits. If the named plaintiff's original action or any of the subsequent individual actions are thereafter dismissed for procedural reasons short of a decision on the merits, the parties' causes of action would then be subject *equally* to whatever tolling, "savings," or other effects as may exist under applicable law.

Concerning the policy of federalism, respondents devote most of their arguments to attempting to demonstrate why the First Circuit's creation of a Puerto Rico tolling rule below is proper and should be deferred to by this Court.[6] Resp. Br. at 21. The arguments are plainly inadequate. Relying on Puerto Rico cases which clearly involved only individual, not class actions, respondents assert in conclusory fashion that the decision below is "proper" and "correct." *See* Resp. Br. at 19-20 and cases cited therein. These assertions are, however, unsupported by any legal reasoning or policy arguments as to why previous interpretations of Puerto Rico's tolling statute, 31

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judicial economy and efficiency that Rule 23, Fed. R. Civ. P., was designed to serve—are not even relevant in the context of an individual suit.

[6] Actually, the deference that is due is to the Supreme Court of Puerto Rico by the federal courts, *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970), and to the District Court of Puerto Rico by the higher federal courts:

> "Particularly where the question involves the proper construction of Puerto Rican law, deference to the district judges who are Spanish speaking and trained in the Spanish civil law is warranted." *Gual Morales* v. *Hernandez Vega*, 579 F.2d 677, 682 (1st Cir. 1978) (citations omitted).

L.P.R.A. § 5303—clearly limited to individual suits and only as to identical causes of action—should be expanded to apply to the asserted non-party members of this purported federal Section 1983 class.

Indeed, there are strong policy reasons within Puerto Rico law against such an expansive approach. In *Diaz de Diana* v. *A.J.A.S. Insurance Co.*, No. 0-79-467 (P.R.S.Ct. December 11, 1980) (reproduced as an appendix to the Reply Brief in the court below of Defendants-Appellants-Cross-Appellees, petitioners herein), the Supreme Court stated that " 'the acknowledged principle of interruption is the *unmistakable manifestation* of one who, threatened with the loss of his right, expresses his wish not to lose it.' " *Slip. Op.* at 6, *quoting Feliciano* v. *A.S.A.*, 93 P.R.R. 638, 660 (1966) (emphasis in original). This statement shows interruption (tolling) to be an entitlement personal to one who takes some action to protect his or her own rights, a view flouted by the First Circuit's extension of the concept to respondents, none of whom took any action in his or her own behalf until January 1979, more than a year and a half after their alleged civil rights actions had accrued. In addition, the holding of the court below contravenes the strict admonition of the Puerto Rico Supreme Court in *Diaz de Diana* that:

> "The jurisprudence of the Supreme Court of Spain has restated that since it is an exception to the extinguishment of a right because of limitation of actions, *anything causing an interruption must be interpreted restrictively.*" *Slip Op.* at 5 n. 1 (emphasis added; citations omitted).

Clearly, this principle cannot be reconciled with the First Circuit's expansive and unprecedented interpretation of Section 5303.[7]

Moreover, the First Circuit's own opinion indicates the absence of any basis for its conclusion in either the statutory or

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[7] Ironically, the First Circuit's decision below on an issue not here involved, and several previous decisions of that court were entirely consistent with *Diaz de Diana*. In rejecting respondents' "extra-

decisional law of Puerto Rico.[8] Again, this fact alone clearly supports petitioners' position that, under this Court's reasoning in *Tomanio*, the Commonwealth of Puerto Rico intended no tolling to occur in these circumstances. *See* Pet. Br. at 27-28.

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judicial claims" tolling argument below, the First Circuit adhered to its decisions in *Gual Morales* v. *Hernandez Vega*, 604 F.2d 730 (1st Cir. 1979), and *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d 321 (1st Cir. 1978), narrowly construing Section 5303. J.A. 141a-143a. In *Hernandez del Valle*, for example, the court stated:

> "[W]e observe that § 5303 goes considerably beyond any tolling provisions of which we were aware in the United States . . . . At the very least, the unusual problems presented by this provision *constrain us from extending its application beyond situations where the courts of the Commonwealth have held it to apply.*" 575 F.2d at 323 (emphasis added).

The court, however, disregarded both Puerto Rico law and its own rule of restraint in "interpreting" Section 5303 in this case.

[8] Such law as can be found suggests a contrary result to that reached by the First Circuit. The conclusion of the court below that the Puerto Rico courts would not follow the *American Pipe* rule seems especially misguided since Puerto Rico's present class action rule is modelled on Rule 23, Fed. R. Civ. P. (J.A. 135a), and the *American Pipe* rule is an interpretation of Rule 23. The Puerto Rico Supreme Court, in applying the class action rule, "[h]as not hesitated to cite . . . recent cases decided in the Federal courts under Rule 23(a) even though technically we are [not] applying . . . [that] Rule." *People* v. *Henneman*, 69 P.R.R. 927, 931 (1949).

Moreover, the one decision of the Supreme Court of Puerto Rico arguably relevant is inconsistent with the First Circuit's view of Puerto Rico law. In *Caguas Lumber Yard, Inc.* v. *Superior Court*, 96 P.R.R. 826 (1969), employees sued seeking back wages for themselves and similarly situated employees under old Rule 20.1(c), P.R.R. Civ. P., the same pro sion that would have governed Ortiz Rivera's proposed class suit, had it been filed in local court. The Supreme Court held that the action had *no legal effect* on the similarly situated employees that plaintiffs purported to represent, absent action by the former to join in the suit, and further noted that the

Respondents attempt to rationalize the construction given by the court below to Puerto Rico's Section 5303 by showing its purported similarity to "savings statutes" enacted by several states. Here again, however, respondents fail to cite a single example of a federal or state class action in which a state savings statute was held to extend or renew the statute of limitations period for asserted class members, or which even suggested that a savings statute was relevant in such a context.[9] Moreover, ". . . a [savings] statute specifically gives to a *plaintiff whose timely action* is dismissed for procedural

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Order issued by the lower court by means of which the similarly situated employees were to be identified "[did] not make these employees plaintiffs . . . ." 96 P.R.R. at 834. Thus, under traditional Puerto Rico law, there is no basis for the First Circuit's finding that the proposed class action complaint had a tolling effect for unnamed, and otherwise inactive, asserted class members.

Finally, the District Court of Puerto Rico has specifically held in a related case that the tolling rule applicable to one of the asserted members of Ortiz Rivera's purported Section 1983 class was the federal rule of *American Pipe*. *Carmen Zoraida Arroyo Quiles* v. *Chardon*, Civil No. 79-75 (PG) (D.P.R. January 20, 1982) (order granting summary judgment for defendants and dismissing complaint), *appeal docketed*, Nos. 82-1242, 82-1481 (1st Cir. May 17, 1982).

[9] Indeed, relevant case law suggests the opposite conclusion. Petitioners have found decisions in at least eight states in which the courts, often having noted that the state class action rule was modelled on Rule 23, Fed. R. Civ. P., have expressly adopted as state law the *American Pipe* federal procedural rule of tolling. *See*, *Pope* v. *Intermountain Gas Co.*, 646 P.2d 988, 1010 n.28 (Idaho 1982); *Munsterman* v. *Illinois Agricultural Auditing Association*, 435 N.E.2d 923, 926 (Ill. App. 1982); *First Baptist Church of Citronelle* v. *Citronelle-Mobile Gathering, Inc.*, 409 So.2d 727, 729-30 (Ala. 1981); *Nolan* v. *Sea Airmotive, Inc.*, 627 P.2d 1035, 1041-47 (Alaska 1981); *Arnold* v. *Dirrim*, 398 N.E.2d 426, 439-40 (Ind. App. 1979); *Douglas* v. *Arthur Andersen & Co.*, 416 N.Y.S.2d 751, 752 (App. Div. 1979); *Levine* v. *Empire Savings and Loan Association*, 579 P.2d 642, 646

reasons such as improper venue a specified time in which to bring a second action." *Burnett* v. *New York Central R.R.*, 380 U.S. at 432 (emphasis added). Of course, asserted members of a purported class action cannot be considered "plaintiffs" in any sense unless and until the class is certified, or if not certified, they intervene or bring another suit. *Cf. American Pipe & Construction* v. *Utah*, 414 U.S. 538 (1974). Thus, whatever the merit of respondents' comparison of Section 5303 with "savings statutes," it has no relevance here.

Addressing the policy of repose, respondents merely point to the conclusion reached below that "all of the parties in these cases are Puerto Rican, and hence there is no unfairness . . . in applying to them the relevant Puerto Rico tolling law." Resp. Br. at 18. Petitioners have already demonstrated how incorrect this conclusion is. The unfairness of the impact of the novel, unprecedented, and unanticipated interpretation of Puerto Rico law by the court below on petitioners' interests in repose is patent. *See* Pet. Br. at 30 & n. 15.

In short, respondents have not really met, much less contradicted petitioners' position that all three of the important federal policies accorded decisional significance by this Court in *Tomanio* are fully consistent with, and indeed militate in favor of the application of the federal procedural rule of tolling established by this Court in *American Pipe*, rather than the *ad hoc* Puerto Rico tolling rule developed by the court below.

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(Colo. App. 1977); *Bergquist* v. *International Realty, Ltd.*, 537 P.2d 553, 561 (Or. 1975) (en banc). Of the eight states from which these decisions come, five, Illinois, Alaska, Indiana, New York, and Oregon, have savings statutes of the type discussed at length by respondents in their brief. Yet, in none of the decisions from the courts of these states applying *American Pipe* is it even suggested that the states' savings statutes might have any relevance to class action tolling issues.

### IV. Application Of The Rule Of *American Pipe* In This Case Does Not Violate The Rules Enabling Act.

The Rules Enabling Act proscribes such federal procedural rules as would "abridge, enlarge or modify any substantive right . . . ." 28 U.S.C. § 2072 (1976). Respondents' final argument[10] is that if Rule 23, Fed. R. Civ. P., is applied in this

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[10] Actually, their final argument appears in a concluding footnote, where they request a remand to the court below should this Court hold for petitioners.

First, respondents propose a new "extended tolling" theory which, if accepted, would save as timely filed the actions of three of the thirty-six respondents herein. *See* Appendix hereto, 1A-7A, which gives as to each respondent the number of days remaining in his or her statute of limitations period as of the date the class suit was brought (Col. IV), the expiration of the statute of limitations after denial of class certification (Col. V), and the date the complaint was filed (Col. VI). Under this "extended tolling" theory, suspension of the statute of limitations would have continued beyond the denial of class certification on August 21, 1978, because "there was a motion for reconsideration which was denied on September 29, 1978 . . . ." Respondents have cited no authority, and petitioners know of none, which would support their claim that this motion, filed September 11, 1978, or any of the subsequent motions referred to, all of which the district court found unmeritorious, had the effect of prolonging suspension of the statute of limitations beyond the date class certification was denied. Indeed, under respondents' theory, tolling could continue indefinitely merely as a result of the repetitive filing of untimely, unmeritorious motions for reconsideration. This would not appear to be sound law. Moreover, respondents did not raise this "extended tolling" argument below on behalf of the three respondents whom it would benefit, and are barred by waiver from raising it on remand. The court below has already correctly found that if *American Pipe* applies, "[t]he tolling would have ended, and the remaining portion of the limitations period would have recommenced running on August 21, 1978, when the district court declined to certify the class." J.A. 132a. Thus, assuming application by this Court of *American Pipe* and a remand for proceedings not in-

case as it was interpreted and applied in *American Pipe*, the Rules Enabling Act will be violated. However, application of the Rules Enabling Act analysis, as elaborated in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), "is premised on a 'direct collision' between the Federal Rule and the state law." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749 (1980) (citation omitted). No such collision can occur in the instant case, and respondents' argument fails accordingly.

The very reason for tolling the statute of limitations in this case arises from an overriding uniform federal rule of procedure governing class action practice in the federal courts. *American Pipe & Construction Co.* v. *Utah, supra; cf. Pavlak* v. *Church, supra.* As such, the rule of *American Pipe* controls and state law never comes into play, nor, indeed, does an analysis under 42 U.S.C. § 1988. Yet, even if we look to Section 1988, it is clear that federal law must be applied unless it is found to be deficient; only then does one look to state law, which applies unless it is inconsistent with the Constitution and laws of the United States. Thus, the very terms of Section 1988 make clear that no conflict in a Rules Enabling Act sense can occur.

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consistent therewith, any "extended tolling" argument would clearly be foreclosed to respondents.

Finally, respondents' suggestion that the court below be allowed on remand to consider "the applicability of Puerto Rico tolling law to [respondents'] pendent Puerto Rico claims . . .," is entirely frivolous. This Court held in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966), that where federal claims are untimely and thus should be dismissed, pendent state claims should be dismissed as well. *See also Hupp* v. *Gray*, 500 F.2d 993, 998 (7th Cir. 1974). Under this principle, if *American Pipe* applies and respondents' Section 1983 claims must be dismissed as untimely, there is no further basis for consideration by the Court of Appeals of the application of state law to respondents' state law-based claims.

## CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals in this case.

Respectfully submitted,

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| I. | II. | III. | IV. | V. | VI. |
|---|---|---|---|---|---|
| Respondent | Date of Notice[1] | Expiration of Statute of Limitations[2] | Period of Statute of Limitations Remaining on June 19, 1978[3] (Days) | Expiration of Statute of Limitations after Denial of Class Certification | Date Complaint Filed[4] |
| Nunez-Rivera, Carmen | 6/77[5] | 6/78 | 11 | 9/1/78 | 1/10/79 |
| Negron-Marin, Carmen L. | 6/23/77 (App.84) | 6/23/78 | 4 | 8/24/78 | 1/10/79 |
| Montes-Velez, Carmen H. | 6/17/77 (App.85) | 6/17/78[6] | 0[6] | N/A | 1/10/79 |
| Garcia Rosado, Carmen | 7/5/77 (App.86) | 7/5/78 | 16 | 9/6/78 | 1/10/79 |
| Torres de Cantres, Noelia | 6/20/77 (App.87) | 6/20/78 | 1 | 8/22/78 | 1/10/79 |
| Rodriquez Rivera, Antonio | Last week of June 1977 (App.91) | Last week of June 1978 | 11 | 9/1/78 | 1/10/79 |
| Aponte de la Torre, Jose E. | 6/30/77 (App.93) | 6/30/78 | 11 | 9/1/78 | 1/15/79 |
| Cardona-Flores, Nilsa | 6/17/77 (App.95) | 6/17/78[6] | 0[6] | N/A | 1/15/79 |

Footnotes are explained on pp. 6A-7A.

| I. | II. | III. | IV. | V. | VI. |
|---|---|---|---|---|---|
| Respondent | Date of Notice[1] | Expiration of Statute of Limitations[2] | Period of Statute of Limitations Remaining on June 19, 1978[3] (Days) | Expiration of Statute of Limitations after Denial of Class Certification | Date Complaint Filed[4] |
| Colon Torres, Elba M. | 6/17/77 (App.96) | 6/17/78[6] | 0[6] | N/A | 1/15/79 |
| Sierra Pizarro, Aurora | 6/24/77 (App.42) | 6/24/78 | 5 | 8/26/78 | 1/15/79 |
| Otero-Arroyo, Virginia | 6/23/77 (App.99) | 6/23/78 | 4 | 8/25/78 | 1/15/79 |
| Ortiz-Colon, Ana Mercedes | 6/17/77 (App.102) | 6/17/78[6] | 0[6] | N/A | 1/15/79 |
| Fumero Soto, Juan | 6/20/77 (App. 103) | 6/20/78 | 1 | 8/22/78 | 1/15/79 |
| Castro De Aguilar, Dora | 6/20/77 (App.40) | 6/20/78 | 1 | 8/22/78 | 1/15/79 |
| Rodriquez-Solivan, Reinaldo | 7/11/77 (App.106) | 7/11/78 | 22 | 9/12/78 | 1/19/79 |
| Denis, Sylvia M. | 6/17/77 (App.107) | 6/17/78[6] | 0[6] | N/A | 1/15/79 |

Footnotes are explained on pp. 6A-7A.

| I. | II. | III. | IV. | V. | VI. |
|---|---|---|---|---|---|
| Respondent | Date of Notice[1] | Expiration of Statute of Limitations[2] | Period of Statute of Limitations Remaining on June 19, 1978[3] (Days) | Expiration of Statute of Limitations after Denial of Class Certification | Date Complaint Filed[4] |
| Castro del Valle, Bienvenido | 6/17/77 (App.108) | 6/17/78[6] | 0[6] | N/A | 1/15/79 |
| Rosario de Bravo, Elba | Third week of June 1977 (App.111) | Third week of June, 1978 | 5 | 8/26/78 | 1/15/79 |
| Norat Zayas, Ramon | 6/23/77 (App.113) | 6/23/78 | 4 | 8/25/78 | 1/12/79 |
| Quiles Mariani, Charles H. | 7/77[5] | 7/78 | 42 | 10/2/78 | 1/15/79 |
| Gonzalez-Velazquez, Santiago | 6/17/77 (App.117) | 6/17/78[6] | 0[6] | N/A | 1/26/79 |
| Rivera Diaz, Bienvenido | Third week of June 1977 (App.118) | Third week of June, 1978 | 5 | 8/26/78 | 1/26/79 |
| Morales-Hernandez, Carmen M. | 7/11/77 (App.120) | 7/11/78 | 22 | 9/12/78 | 1/26/79 |
| Rivera-Pagan, Juan | 6/77[5] | 6/78 | 11 | 9/1/78 | 1/26/79 |

Footnotes are explained on pp. 6A-7A.

| I. | II. | III. | IV. | V. | VI. |
|---|---|---|---|---|---|
| Respondent | Date of Notice[1] | Expiration of Statute of Limitations[2] | Period of Statute of Limitations Remaining on June 19, 1978[3] (Days) | Expiration of Statute of Limitations after Denial of Class Certification | Date Complaint Filed[4] |
| Colon Santiago, Angela | 6/17/77 (App.121) | 6/17/78[6] | 0[6] | N/A | 1/26/79 |
| Cruz-Mendez, Joaquin | Last week of June/ first week of July 1977 (App.122) | Last week June/ 1st week July 1978 | 12 | 9/2/78 | 1/26/79 |
| Aguilar Quintero, Ursula | Third week of June, 1977 (App.123) | Third week of June, 1978 | 5 | 8/26/78 | 1/26/79 |
| Rivera Cardona, Aminta | 6/77[5] | 6/78 | 11 | 9/1/78 | 1/26/79 |
| Cruz-Cruz, Roberto | Third week of June, 1977 (App.124) | Third week of June, 1978 | 5 | 8/26/78 | 1/26/79 |
| Velez Quinonez, Nelson | 6/22/77 (App.125) | 6/22/78 | 3 | 8/24/78 | 1/26/79 |
| Cancel-Cuevas, Cristina | 6/77[5] | 6/78 | 11 | 9/1/78 | 1/31/79 |
| Guerra-Navarro, Maria D. | 6/77[5] | 6/78 | 11 | 9/1/78 | 1/31/79 |

Footnotes are explained on pp. 6A-7A.

| I. | II. | III. | IV. | V. | VI. |
|---|---|---|---|---|---|
| Respondent | Date of Notice[1] | Expiration of Statute of Limitations[2] | Period of Statute of Limitations Remaining on June 19, 1978[3] (Days) | Expiration of Statute of Limitations after Denial of Class Certification | Date Complaint Filed[4] |
| Bonilla-Ocasio, Francisco | 8/8/77 (App.126) | 8/8/78 | 50 | 10/10/78 | 1/31/79 |
| Gallardo Gutierrez, Heriberto | 11/4/77 (App.127) | 11/4/78 | 138 | 1/6/79 | 1/31/79 |
| Colon, Julio E. | 7/6/77 (App.128) | 7/6/78 | 17 | 9/7/78 | 1/31/79 |
| Rodriguez Rios, Aida | 6/20/77 (App.129) | 6/20/78 | 1 | 8/22/78 | 1/24/79 |



Footnotes are explained on pp. 6A-7A.

## FOOTNOTES

[1] These dates are derived from either (i) a sworn statement filed in the district court, (ii) a letter of protest attached to certain complaints, or (iii) a generous approximation of when notice was received taken from certain other complaints. Pursuant to district court order, sworn statements were filed by 28 respondents attesting to the dates on which they received notice of non-reappointment. In the case of two respondents, where no sworn statement could be readily found, copies of the letters of protest sent by them to the Office of the Secretary of Education after receiving notice of their non-reappointment have been used. As is apparent, these respondents had received their notifications on or before the dates of these letters. The date shown in the foregoing table is, however, the later date of the protest letter. The sworn statements and letters of protest are included in the Joint Appendix in the Court of Appeals proceeding, as indicated by the references adjacent to the notice dates. As to the remaining six respondents, the notice date herein is based on their general allegations in their complaints. *See* n.5 below.

[2] The applicable statutes of limitations for purposes of these § 1983 actions is one year. 31 L.P.R.A. 5298(2).

[3] Assuming that the filing of Ortiz Rivera's class action on June 19, 1978, tolled the running of the statute as to certain respondents, these figures indicate how much time remained for each of them. If suspended, the statutory period resumed running when class certification was denied on August 21, 1978.

[4] These dates have been taken directly from the district court docket sheets in each of these consolidated cases and their accuracy has been stipulated by all parties.

[5] The complaints of these respondents provide the only currently available data as to receipt of notice. Para. 10 of the complaints of Nunez Rivera, Rivera Cardona, Cancel Cuevas, Guerra-Navarro, and Rivera Pagan allege that notice was received "[o]n or about June, 1977." Para. 10 of the complaint of Quiles Mariani alleges "[o]n or about July, 1977." All parties have stipulated that the complaints of these respondents so state. For purposes of the information in this table, it is assumed that these respondents received notice on the last day of the specified month.

[6] The Court of Appeals held as to these eight respondents that the statute of limitations did not expire on June 17, 1978, since it was a Saturday; that under Rule 6, Fed. R. Civ. P., Saturdays, Sundays, and legal holidays are excluded from time computations; and therefore that the filing of the class suit by Ortiz Rivera on Monday, June 19, 1978, tolled the running of the statute of limitations as to them.

{SHOW }  PROCEEDINGS AND ORDERS  DATE: 033083

CASE NBR 82-1-00271 CFX

SHORT TITLE Chardon, Carlos, et al.  DOCKETED: Aug 16 1982

VERSUS Soto, Juan Fumero, et al.

| Date | Proceedings and Orders |
|---|---|
| Aug 16 1982 | Petition for writ of certiorari filed. |
| Sep 14 1982 | Brief of respondent Juan Fumero Soto in opposition filed. |
| Oct 8 1982 | Reply brief of petitioner Carlos Chardon, et al. filed. |
| Oct 19 1982 | Supplemental brief of respondent filed. |
| Oct 20 1982 | DISTRIBUTED. November 5, 1982 |
| Nov 8 1982 | Petition GRANTED. limited to Questions 1 and 2 presented by the petition. |
| | ********** |
| Dec 22 1982 | Brief of petitioner Carlos Chardon, et al. filed. |
| Dec 22 1982 | Joint appendix filed. |
| Jan 21 1983 | Brief of respondents Juan Fumero Soto, et al. filed. |
| Feb 15 1983 | SET FOR ARGUMENT. Wednesday, March 23, 1983. (2nd case) |
| Feb 15 1983 | CIRCULATED. |
| Feb 18 1983 | Record filed. |
| Feb 18 1983 | Certified original record & C.A. proceedings, 14 volumes |

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 033083

CASE NBR 82-1-00271 CFX

SHORT TITLE Chardon, Carlos, et al. DOCKETED: Aug 16 1982

VERSUS Soto, Juan Fumero, et al.

| Date | Proceedings and Orders |
|---|---|
| Feb 18 1983 | Certified original record & C.A. proceedings, 14 volumes (Box) received. |
| Mar 11 1983 | Reply brief of petitioner Carlos Chardon, et al. filed. |
| Mar 23 1983 | ARGUED. |